In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, *Petitioners,*

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CONOCO; UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Douglas Oil Company of California and Phillips Petroleum Company[1] respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 20, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto at pages A-1 through A-8. No memorandum opinion of the District Court was issued. The reporter's transcript of proceedings of the District Court on March 28, 1977, appears in Appendix B hereto at pages B-1 through B-16.

[1] Hereinafter referred to as Douglas and Phillips.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 20, 1978. This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c) within ninety days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the district court in which the civil action is pending — the court familiar with the lawsuit and charged with responsibility for its administration — is the proper court to determine issues of relevancy and "particularized need" when secret grand jury transcripts are sought, rather than the judge of a foreign court who is unfamiliar with both the civil action for which the transcripts are sought and the criminal action which was brought as a result of the grand jury proceedings.

2. Whether the plaintiffs in a civil action have established a compelling necessity ("particularized need") for wholesale discovery of secret grand jury transcripts merely by showing that several defendants pleaded *nolo contendere* to a grand jury antitrust indictment returned over one year *after* the civil action was filed where the conspiracy alleged in the indictment is not the same conspiracy as that alleged in the civil action and where the matters considered by the grand jury are not shown even to be relevant to the civil action.

STATUTE INVOLVED

Federal Rule of Criminal Procedure, Rule 6(e):

(1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made

under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) *Sealed indictments.* The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

In 1973, two separate lawsuits were filed in the United States District Court, District of Arizona — one by respondent Petrol Stops Northwest and the other by respondents Gas-A-Tron of Arizona and Coinoco[2] — against a number of gasoline refiners and wholesalers. Phillips was named as a defendant in both lawsuits and Douglas was named in one. Although charging myriad purported antitrust violations, the gravamen of the Arizona complaints is the defendants' alleged conspiracy to restrict the plaintiffs' supply of gasoline.[3]

On March 17, 1975, over *one year after* the Arizona complaints were filed, an indictment was returned in the United States District Court, Central District of California charging Phillips, Douglas and four other corporate defendants with a conspiracy to fix the price of

[2] For convenience respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco will hereinafter be referred to as "Petrol Stops."

[3] The Petrol Stops complaint, for example, alleges that plaintiff's supply of gasoline has "been drastically reduced pursuant to violations of the antitrust laws alleged in this complaint and plaintiff has been forced to close many of its outlets."

"rebrand gasoline."[4] *None* of the defendants in the grand jury indictment other than Douglas and Phillips were named in either Arizona action. *None* of the refiners and wholesalers named in the Arizona actions, except Douglas and Phillips, were named in the indictment.

In October of 1976, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Petrol Stops filed and served in the Arizona actions a request for all of the grand jury documents and transcripts in the possession of Douglas and Phillips.[5] Douglas and Phillips objected to the production of those items on the grounds that they were not relevant to the Arizona litigation. Rather than challenging that objection in the Arizona court, Petrol Stops instead filed a petition for production with the District Court for the Central District of California, a court wholly unfamiliar with the underlying civil actions. Said petition sought the disclosure of those same documents and transcripts, copies of which were in the possession of the Antitrust Division of the United States Department of Justice.

The Antitrust Division did not object to the disclosure, but suggested that Douglas and Phillips ought to be afforded the right to be heard. Douglas and Phillips thereupon appeared as real parties in interest and opposed the petition, arguing that the Arizona court was the proper court to determine relevancy and need, and that Petrol Stops ought not to be permitted to "forum shop". In its papers in support of the petition, Petrol Stops made only a single offering of fact to demonstrate its "particularized need" for the production of the grand jury materials, namely that Douglas and Phillips had

[4] The indictment defined "rebrand gasoline" as "gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner."

[5] Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury.

stated in response to one of Petrol Stops' interrogatories that they were unaware of any conversations or communications with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Although the indictment involved different defendants and was not shown to involve the same sphere of business as the Arizona lawsuits, Petrol Stops nevertheless argued that since Douglas and Phillips had pleaded *nolo contendere* in the criminal action, the transcripts and documents would be useful in assisting discovery and in impeaching the interrogatory response.

At the hearing on the petition, the District Judge admitted that he had not been involved with the grand jury proceeding and that he had "no information about the considerations of problems that the grand jury had when they considered this matter. . . . " (Appendix, at B-4) In his comments, the District Judge indicated that he had no firm foundation for a belief that the requested grand jury material would be relevant to the Arizona lawsuits, and added that he did not think that relevancy was important to the considerations involved. Specifically, the judge stated:

> "The petitioners [respondents herein] seemed to think it [the grand jury transcript] is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceedings involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. *I don't know.* But suppose it isn't relevant? If there is no harm in going through the list of reasons of [sic] the sanctity of the grand jury proceedings, if there is no harm in its being divulged, *why are we worried particularly about whether or not it is relevant?*" [Emphasis added.] (Appendix, at B-8)

The District Court entered an order granting Petrol Stops' production request with certain limitations on use of the materials. Douglas and Phillips sought and obtained a stay of the order pending appeal to the Court of Appeals for the Ninth Circuit. On March 20, 1978, the Court of Appeals affirmed the order of the District Court. In so deciding, the Court of Appeals in pertinent part held:

> "Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment."[6] (Appendix, at A-7)

REASONS FOR GRANTING THE WRIT

This Court enunciated the standards governing the secrecy of grand jury materials in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). As stated by this Court,

> "The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This 'indispensa-

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[6] On October 31, 1977, Petrol Stops moved to supplement the appellate record with unfinished and unsigned deposition testimony which purportedly showed additional need and which was not before the District Court when it ruled upon the Petrol Stops petition. The Court of Appeals (per Judge Hufstedler) denied the motion, but added that ". . . the materials in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper." (Order entered Dec. 5, 1977). These materials, which were *never* before the District Court, nevertheless found their way into the appellate opinion. "On appeal Petrol Stops make a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions." (Appendix, at A-7)

ble secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."

The courts below have utterly failed, however, to apply those standards in this case. This failure is largely attributable to the procedure followed, for the District Court was without adequate information and incentive to undertake the sensitive balancing required to determine whether a showing of particularized need sufficient to warrant the wholesale disclosure of grand jury transcripts and documents to civil plaintiffs had been made. This case presents considerations of great importance involving both the allocation of responsibility among district courts for determining questions of particularized need and the showing by civil plaintiffs, if any, that is now required to procure secret grand jury transcripts.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL PROCEDURE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; NAMELY, WHETHER A DISTRICT COURT NOT FAMILIAR WITH THE ISSUES OF A CIVIL PROCEEDING IN CONNECTION WITH WHICH GRAND JURY MATERIALS ARE SOUGHT SHOULD NEVERTHELESS MAKE A DETERMINATION OF RELEVANCY AND PARTICULARIZED NEED IN CONNECTION WITH A PETITION UNDER RULE 6(e) F.R.Cr.P. FOR DISCOVERY OF THE GRAND JURY MATERIALS.

This case typifies the problems which arise when a district court, which has no familiarity with the civil lawsuit pending in another jurisdiction, is called upon to determine whether a party to that foreign lawsuit

has demonstrated a particularized need for disclosure of the grand jury materials. The determination of "particularized need" requires a balancing of the continued reasons for grand jury secrecy against the compelling necessity of the private party litigant for that information. *Procter & Gamble, supra,* 356 U.S. at 682. That balancing can only effectively be done by the court in which the civil suit is pending.

Where, as here, the grand jury proceedings have been completed, the court in which the civil suit is pending can identify the remaining reasons for grand jury secrecy as well as the court in which the grand jury proceedings were held. Normally, where a civil litigant seeks grand jury materials after the criminal case has been concluded, the primary reason for continued secrecy is the need to encourage free and untrammeled disclosure of information in future grand jury proceedings. *Procter & Gamble, supra.* Because that consideration involves general issues of policy rather than particular facts, no one district court is better equipped than another to gauge the import of that concern. In particular where the judge hearing the petition for disclosure of grand jury materials is not the same judge who had jurisdiction over the criminal action resulting from the indictment (as was the case here) it would make little difference which judge considered the need for continued grand jury secrecy.

Conversely, only one court — the court in which the civil suit is pending — is capable of assessing whether a civil litigant actually has a particularized need for the grand jury material sought. That court has all the information, or at least the incentive to acquire all of the information, necessary to determine whether grand jury materials are relevant to the instant lawsuit and whether a particularized need beyond mere relevance exists. The court in which the civil action is pending is therefore the

only court that could reasonably be expected to undertake the sensitive balancing required by this Court in *Procter & Gamble*. Where, as in this case, materials are sought in a protracted antitrust case, a foreign court cannot be expected to educate itself as to the complex legal and factual aspects of the case. To avoid that burden, the California District Judge here simply ruled that the question of relevancy was not important.[7]

The proper solution to this problem was reached by Chief Judge Clary in the United States District Court for the Eastern District of Pennsylvania in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962). There, Judge Clary, after considering the need for continued secrecy, made available to other trial judges in other jurisdictions the grand jury transcripts which were in his jurisdiction in order that the other trial judges could make the determination of particularized need which they alone would have been competent to make in the disposition of the civil cases before them.[8] The California District Court was invited

[7] Where the District Court Judge below (Judge Gray) was subsequently asked to permit disclosure of these same grand jury materials in a different civil action over which *he* was presiding, his response was much different. In *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, MDL 150 WPG, Judge Gray's own case, he refused to grant a motion of the plaintiffs in that litigation (filed after the petition herein) for discovery of, among other things, the very same transcripts and documents which he ordered turned over to Petrol Stops in this case. Where his understanding of the case and motivation were greater, Judge Gray exercised considerable restraint and required careful showings of relevance and particularized need. This contrasts significantly with his approach in this matter where he lacked that understanding.

[8] In this case, the court in which the civil suits are pending (the Arizona court) has jurisdiction over the documents in the possession of the defendants while the court in which the grand jury sat (the California court) has jurisdiction over the documents in the possession of the government. Where an Arizona plaintiff seeks disclosure of grand jury materials the proper procedure, consistent with the concerns articulated above, would be for the California court to make the grand jury materials available to the *judge* presiding over the Arizona lawsuits for whatever disposition that judge deems proper.

to follow such a procedure but declined.[9] Instead, it took upon itself the responsibility for determining issues (relevancy and particularized need) on which it was not adequately informed, and attempted to excuse this lack of information by erroneously holding that such issues were not important.

II. BY VIRTUE OF THE PROCEDURAL INFIRMITY DISCUSSED ABOVE, THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH A DECISION OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS.

A. The Decision of the Court of Appeals Conflicts with a Decision of This Court.

In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), this Court explicitly prescribed the manner in which "particularized need" was to be determined by the lower courts if disclosure of secret grand jury materials was to be permitted. As a minimum showing, a trial judge must require: (1) that the relevancy and useful-

[9] Petrol Stops argued below that the District Court Judge offered to allow the Arizona courts an opportunity to determine particularized need, but that Douglas and Phillips rejected that request. At the hearing on the petition, in response to the protestations of counsel for Douglas and Phillips, the District Court Judge only gratuitously offered to "telephone Judge Walsh and Judge Frey [the Arizona judges] to see if they have any objection." The District Court Judge did not, however, propose to submit the matter to the Arizona judges for a determination of the issues of relevancy and particularized need. A casual telephone call does not satisfy the hearing requirements of federal law. Such a call to see if the Arizona judges "had any objection" to the ruling of a California judge is not nearly the same as a hearing on the merits of relevancy and particularized need. Moreover, it is clear from the context of the District Court Judge's remarks that the offer was not seriously intended to invite acceptance. (Appendix, at B-7)

ness of the testimony be sufficiently established; (2) that proof be required that without the transcript the party would be greatly prejudiced, or without reference to it an injustice would be done; and (3) that the need shown be "*particularized*", *i.e.*, that the need exists for grand jury transcripts specifically to impeach *a* witness, to refresh *a* witness' recollection, or to test *a* witness' credibility. 356 U.S. at 682-83.

The California District Court Judge, with neither the information, the time, nor the incentive to examine whether or not the grand jury materials were relevant to a complex antitrust lawsuit filed in a different district well before the indictment was returned, and whether or not particularized need existed, did not carry out this Court's mandate principally because he could not. In affirming the District Court's action, the Court of Appeals also failed to follow the principles set out by this Court.

The District Court did not require that the relevancy and usefulness of the testimony be sufficiently established and in fact expressed the opinion that it was not particularly worried whether or not the materials were even relevant to the Arizona lawsuits. (Appendix, at B-8) No presumption of relevancy could have existed for it is clear that the indictments and the civil actions differed as to identity of the alleged conspirators.[10] Likewise, no showing was ever made that the scope of the alleged conspiracies were the same. The District Court did not require from Petrol Stops any proof or substantial showing that without the transcripts Petrol Stops would be

[10] The indictment named Douglas, Phillips and four other corporate defendants ("four corporate co-defendants"). The suit brought by Gas-A-Tron of Arizona and Coinoco named Phillips and eight additional oil companies but not Douglas and the four corporate co-defendants. The suit initiated by Petrol Stops Northwest charged twelve defendants, including Phillips and Douglas, but not the four other corporate co-defendants.

greatly prejudiced or injustice would be done. Finally, the District Court failed to require any showing by Petrol Stops that its need for the grand jury materials was sufficiently particularized. The purported "particularized need" offered before the District Court by Petrol Stops was an alleged need to impeach an interrogatory answer. However, because the conspiracy charged in the indictment is different from the conspiracies alleged in the civil actions, the testimony in the grand jury transcripts could not be used for impeachment since it would be on collateral matters. *See* generally, IIIA *Wigmore On Evidence*, §§1001-1002 (Chadbourn Rev. 1970). Thus, the purported need advanced by Petrol Stops was neither particularized nor real.

The inability of the District Court to examine adequately those matters necessary to determine whether particularized need existed has resulted in the application of a "slight need" standard by the Court of Appeals. That standard, measured by the holding of the court upon the facts of the case, demonstrates that grand jury secrecy was afforded inadequate protection in this proceeding and that the policy of grand jury secrecy enunciated by this Court in *Procter & Gamble* is now without vitality in the Ninth Circuit.

B. The Decision of the Court of Appeals Conflicts With Decisions of Other Circuits.

There is also a conflict among the circuits which have considered this issue of the appropriate standard of particularized need to be applied. On the one hand, the Fifth Circuit has stated that a primary reason for grand jury secrecy is "to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need . . .[footnote omitted]." *State of Texas v. United States Steel Corp.*, 546 F.2d 626, 629 (5th Cir.), *cert. denied*, 45 U.S.L.W. 3238 (1977). The Fifth Circuit has

adhered to the strict standard of *Procter & Gamble* and has required a showing of compelling necessity. *C.f., Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2nd Cir. 1974) where the Second Circuit indicated its disapproval of a standard of "slight need" in this context. The Seventh Circuit, in *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775-777 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977), has permitted access to grand jury transcripts on a showing of need which was less than a "compelling necessity", but even in that case the required showing was greater than that made here. Unlike this case, the civil action in *Sarbaugh* alleged the identical conspiracy charged in the indictment.[11]

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[11] Douglas and Phillips are aware of one other currently pending petition for writ of certiorari, *Alton Box Board Company, et al., and Richard Eldh v. United States* (In Re Folding Carton Antitrust Litigation), No. 77-1390, which raises issues similar to those raised herein concerning the adequacy of a showing of particularized need. The *Alton Box Board* case, however, does not raise the additional problem presented by this case, *i.e.*, the granting of a civil plaintiff's petition for discovery of grand jury transcripts by the judge in a jurisdiction other than the one in which the civil lawsuit is pending.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this action.

DATED: April 27, 1978.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA, AND
COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF
CALIFORNIA,
PHILLIPS PETROLEUM COMPANY,
Appellants.

March 30, 1978

No. 77-2305

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company*, 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests.

After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggests no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute.

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[1] There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

[2] Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J.L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

We previously applied the Supreme Court's standards in *U.S. Industries, Inc., v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information, which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Corporate witnesses are vulnerable to their corporate em-

[3] The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

ployers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for inpeachment as sufficient. *SEC. v. National Student Marketing*, 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings*, 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harpor & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient. *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc. v. Globe Ticket Co.*, 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra*, recently held that a grant of access with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce*, 323 F.2d 233, 238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh*, 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J.L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the

district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not seek the materials merely for a general fishing expedition. It made a sufficient showing of particularized

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[4] We think that the Central District of California court was the proper district court to consider the issue. It was best situated to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh*, 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5] In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

Miscellaneous
No. 5706

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 28, 1977

BEN NEWLANDER
Official Reporter
404 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
(213) 622-5545

APPEARANCES:

On behalf of petitioners:

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On behalf of respondent:

ANTITRUST DIVISION
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312 North Spring Street
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RAYMOND P. HERNACKI,
Deputy Attorney General

On behalf of Douglas Oil Company:

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45th Floor
Los Angeles, California 90071, by
MORRIS THURSTON, ESQ.

On behalf of Phillips Petroleum Company:

EVANS, KITCHEL & JENCKES, P.C.
363 North First Avenue
Phoenix, Arizona 85003, by
HAROLD J. BLISS, JR., ESQ.

and

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014, by
JOHN H. BRINSLEY, ESQ.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 28, 1977; 2:00 P.M.

THE CLERK: Item No. 18, Miscellaneous 5706, Petrol Stops Northwest v. United States of America and others. Motion of petitioner for production, inspection, et cetera of grand jury transcripts.

MR. THURSTON: Good morning, your Honor. I am Morris Thurston of Latham & Watkins for I guess the real party in interest Douglas Oil Company.

THE COURT: All right. You are the fellow that wrote that very able brief.

MR. THURSTON: I am not certain about that, your Honor. I have here also Mr. Bliss. I am not sure whose brief you are referring to so I hate to take credit for his work. Mr. Bliss represents Phillips Petroleum.

THE COURT: Good afternoon, Mr. Bliss.

MR. BLISS: Good afternoon, your Honor.

MR. PARRY: Your Honor, my name is Douglas Parry. This is Daniel Berman. We represent the petitioners in this action.

THE COURT: Yes.

MR. HERNACKI: Raymond Hernacki on behalf of the Antitrust Division. I think I am just a bystander in this proceeding, your Honor.

THE COURT: All right. Gentlemen, I will be glad to hear such arguments as you might find appropriate. Rather than have you argue in a vacuum, suppose I give you the Court's impressions, having read your papers.

In the first place, I think this Court has full jurisdiction to consider the matter. The defendants Phillips and Douglas raised that point. As a matter of fact, if Judge

Holtzoff is right, and he was a pretty good judge in the District of Columbia, this court would be the only one that would have jurisdiction. That is what he said in the case of Herman Schwabe, Inc. v. United Shoe Machinery.

And the Seventh Circuit in the In Re April 1956 Term Grand Jury also expressed the view that the court where the grand jury sits is the one that has jurisdiction. I think there is considerable reason for that. Although personally I have no information about the considerations of problems that the grand jury had when they considered this matter, presumably the judge who was the criminal duty judge at that time might well have had some knowledge of what the grand jury was considering and the problems in connection with it. But certainly the criminal duty judge of this court is better able to determine the sensitivity of grand jury proceedings than is a court in another district.

In any event, I conclude that I have jurisdiction over the matter and am disposed to proceed with that in mind.

With respect to the merits, the Procter & Gamble case says that the petitioners must show a particularized need. As I think it was Justice Douglas in that case said, this requires a lot of balancing.

First, it seems to me that seeking to obtain this information for purposes of impeachment constitutes a valid purpose in itself. The District Court in the Northern District of Illinois, Judge Ed Robson, had almost this very same problem in the case of In Re Cement Concrete Block at 381 F.Supp, almost the identical problem, and he concluded that the expression of need to hear what these employees have said before the grand jury in order that they might be prepared to impeach their testimony is a valid basis for seeking the information given by such employees at the grand jury hearing. His opinion is also relevant in another respect that I will mention in just a minute.

Also, another thing to consider in doing this balancing is the validity or the pertinence of the reasons for maintaining secrecy of grand jury proceedings.

In Judge Barnes's opinion in the Ninth Circuit case of U. S. Industries v. The United States District Court for the Southern District of California, Judge Barnes, just as Judge Robson did in the case that I just mentioned, talked about five classic reasons for secrecy in grand jury proceedings. The first is to prevent escape of those whose indictment may be contemplated, which is not pertinent here.

The second is to ensure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning grand jurors. Of course the grand jury has long since been discharged and that isn't of pertinence anymore.

The third is to prevent subornation of perjury or tampering with a witness who may testify before the grand jury and who may later appear for trial. That isn't of any relevance anymore.

The fourth is to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes. That is pertinent.

The fifth is to protect an innocent accused who is exonerated of the fact that he is under investigation and the expense of standing trial. That isn't of pertinence anymore.

So the fourth is the only one that has pertinence, but the defendants in this case have all the information. As I understand it from the government, representatives of Douglas and Phillips did examine the transcripts of the testimony of their fellow employees or their employees, and it is only the testimony of those people that is sought in the first request, as I understand it. The petitioners seek the information with respect to the transcripts that

were made available to Douglas and Phillips, and also they seek the documents that were submitted by Douglas and Phillips. So, if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.

And when you get right down to it, this is a civil antitrust action. I don't know what those people said. I don't know whether their testimony would help Douglas or help the plaintiffs, but in matters of discovery it is best that both sides have the information available. That is what discovery is for. Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also.

All right, that is where the laboring oar lies, gentlemen. Do you want to pull it?

MR. THURSTON: Your Honor, perhaps two points. The first one goes perhaps more to the substance of the last comment that you made. There is a very recent case very recently reported — in fact reported after we had filed our brief — entitled the State of Texas v. United States Steel Corp., 546 F.2d 627. It is a Fifth Circuit case. In that case it was pointed out that a corporation obtaining grand jury transcripts of its own employees did not destroy the supposed grand jury secrecy. I think the rationale behind that case is that employees are not reluctant to have their own employers see what it is that they have testified to. The grand jury secrecy can be maintained within the company, within the family, so to speak. When the secrecy goes further, it is a different matter.

But with that sort of a sideline comment, I suppose, the main thrust of my comments would be that while we do not dispute that your Honor has jurisdiction over the petition here, we question whether that jurisdiction needs to be exercised at the present time or whether the question

is really ripe. These petitioners have a civil case going in the State of Arizona. They have asked for discovery of these materials in that Arizona case. The defendants have, as you pointed out, all of the grand jury transcripts and all of the documents in their possession. It seems to me that the Arizona court does have both jurisdiction and probably a better feel for whether or not the traditional discovery methods are appropriate here and whether or not these materials should be discovered through those methods.

THE COURT: Who is the judge in Arizona?

MR. THURSTON: Judge Walsh and Judge Frey.

THE COURT: I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here.

Anyway, how would Judge Walsh or Judge Frey have any objection to the avoidance of a discovery scrap before them? If on some other proper basis the petitioners can get the information, why would they care?

MR. THURSTON: Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to

make that decision. It would seem to me, having made that decision, if there was yet a question as to whether the transcripts could be turned over, at that time perhaps it is ripe and appropriate for this Court to make that decision; but the initial relevancy decision, it would seem to me, would go both to the propriety of the initial discovery and to the question of particularized need. If those judges determine they are not relevant, it seems to me that the particularized need is very difficult to show here.

THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?

MR. THURSTON: Your Honor, I think that one of the reasons for grand jury secrecy, and it is perhaps embodied in the ones that you mentioned, is that these proceedings are not just to be spread over to the public —

THE COURT: That is right.

MR. THURSTON: — to look at possible violations that have no particular relevance to anything. It is possible that there were — not possible. It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, whereas the proceedings in Arizona may not involve such a broad territory. It just seems, if the relevancy is first established in Arizona, then we've got a good reason to come here to this court, but if that —

THE COURT: I am not going to deny the motion. If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern.

As far as relevance, I would think that there is a prima facie relevance because of the nature of the grand jury inquiry with relation to the proceedings here concerned.

MR. THURSTON: It is true, your Honor, that the grand jury inquired as to antitrust violations, but, of course, there is a very wide range of possibilities there.

THE COURT: Yes. Would you educate the Court as to why you think this information may be relevant, gentlemen. Anybody from your side.

MR. BERMAN: Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers.

THE COURT: You filed your complaint on the basis that there was a nolo contendere plea on the prosecution here?

MR. BERMAN: We filed our complaint first before the indictment, your Honor, but the indictments — and I have the paragraph citations — are absolutely parallel to the charging paragraphs of the indictment, and that I think establishes the relevancy.

THE COURT: If it was relevant to the grand jury inquiry, it would ipso facto be relevant to your case as far as you are concerned?

MR. BERMAN: That is correct, your Honor.

THE COURT: All right.

MR. BLISS: Your Honor, if I may speak to the relevancy question. Harold Bliss. The plaintiffs' complaints were filed well over a year before the grand jury indictment.

THE COURT: A year before?

MR. BLISS: Yes, your Honor. The Gas-A-Tron case involves only retail sales in Arizona. The plaintiffs in Arizona are engaged in the retail gasoline business, principally in Tucson, Arizona. None of the — well, the only supplier that the plaintiff had was Eugene Lewis, Lewis Arizona Oil Co., and Mr. Lewis' supplier was Shell Oil Company. Now, Shell Oil Company was not indicted and Shell Oil was not named as an unindicted co-conspirator, nor was Lewis Oil Co. So, if Phillips and Douglas had conspired to fix the wholesale price, it wouldn't have any effect on the plaintiffs because they didn't receive their supply from either the indicted companies or the alleged co-conspirators.

In the Petrol Stops complaint, there are thirty-one different types of Sherman Act violations alleged. Since that suit was filed the deposition has been taken by the defendants of Mr. Robert Borgert, who is one of the partners and the chief operating officer of Petrol Stops, and through that deposition we have been able to narrow down the scope of that lawsuit. Essentially what he is talking about, and I have cited the pages in my brief and I have attached copies of the deposition pages, he is talking about attempts to control his business at the retail level to get him to engage in retail price fixing. He says this was done by solicitations to have them join; by comments made by one or more of his suppliers that he has to get his prices in line or he is going to lose supply; and by predatory pricing by the defendants in that they would bring in subsidy, drive the price down

below his buying price and attempt to put him out of business. Not once in there did he say that he is complaining about wholesale price fixing. We have fourteen pages in over 2200 pages of testimony, and nowhere in there does he make the complaint that he is talking about a wholesale price fixing case. He is talking about activities at the retail level.

For that reason we are saying that the grand jury indictment, the transcripts and the documents are not relevant to his lawsuit and that this determination should be made by the Arizona court initially. For one reason, there are other defendants and there has been subsequent request to produce documents going to these type of documents and transcripts that are addressed in the Arizona cases that presumably will be decided by Judge Frey or Judge Walsh in the Rule 37 proceeding, which is the way I think this should be handled now rather than over here.

THE COURT: All right, thank you.

MR. BLISS: That is all I have to say about relevance at the moment.

THE COURT: All right. I am not going to make any orders upon the defendants. I am not going, in effect, to issue upon the defendants a demand to produce. If the plaintiff wants to get the defendants to produce anything, that can be done through that litigation. But the petitioners have asked for access to certain grand jury records, and that request will be granted with respect to the first request. That is the one where you asked for access to the same information that was accorded the defendants and the documents that they produced.

Have I correctly articulated your request?

MR. BERMAN: That is correct, your Honor.

THE COURT: And the Government so understands it?

MR. HERNACKI: Yes, your Honor.

THE COURT: All right, that access will be made.

What is your name, sir?

MR. HERNACKI: Hernacki.

THE COURT: Mr. Hernacki, you said the best way to do it would be to have the defendants make the papers that they got from the grand jury available. I am not going to do it that way. You make arrangements with the petitioners to have access to that information. If Phillips and Douglas want to cooperate in the mechanics of reproduction that is all right, but my order is simply that the grand jury records will be opened up to that limited extent. Do you understand, sir?

MR. HERNACKI: In other words, your Honor, we are to make the documents available; however, if Phillips and Douglas wish themselves to produce a set of documents —

THE COURT: That is up to them.

MR. HERNACKI: — that is up to them.

THE COURT: That is a matter among you.

MR. HERNACKI: Yes.

THE COURT: My order is simply that the custodians of the grand jury records will make them available to that extent to the petitioners. That is with respect to the first request.

With respect to your second request, I am about to deny it. In the first place, as I think Phillips and the Government said, there are no points and authorities and there is no need shown with respect to them. Also, some of this information that was before the grand jury may have come from or be relevant to competitors or something of that kind. I don't think there is any showing that would justify your having any more than you asked for in the first request.

MR. PERRY: Excuse me, your Honor. The second request was not to be before the Court today. We made an agreement a month or so ago that we would not involve in this hearing any of the parties other than Phillips, Douglas and Continental.

THE COURT: I see.

MR. PARRY: That one was filed improperly. Hearing date would have to be set in the future after proper briefs and memorandums have been filed.

THE COURT: All right.

MR. PARRY: That was our mistake, your Honor.

THE COURT: If I am not asked to rule on that, I am not doing so. But now you understand who has the uphill battle on that one.

MR. BERMAN: Yes, your Honor.

THE COURT: Anything further, gentlemen?

MR. BLISS: Your honor, my initial comments were restricted solely to relevance. I would like to talk about the cases on the merits of disclosing the grand jury documents.

You referred to Judge Robson's decision in the Concrete Block case as far as impeachment is concerned. The plaintiffs have cited a number of other cases in which transcripts were made available to civil plaintiffs. In all of those cases, your Honor, a deposition was being taken and the deponent was evasive or couldn't remember anything.

In this case no deposition has even been noticed of any defendants. There hasn't been any opportunity for them to be shown to be vague or unresponsive or to fail to recollect what the testimony is, and there has been no

particularized showing of a compelling need. Until there is something of that nature, I believe the transcripts should remain secret, as they have been ruled in the State of Texas vs. U. S. Steel Corporation that Mr. Thurston referred to. I think that case disposes of the numerous district court cases that the petitioners have cited, saying that if the defendant has them under Rule 16 of the federal criminal rules that then there is no need for particularized showing of compelling need. I think that is the most recent authority out of the Fifth Circuit, and I think it is correct.

As far as the U. S. Industries case is concerned, that case involved a governmental pre-sentencing memorandum that had been shown to the defendants. The petitioners could not get that any other way but through the Government. Here we have the documents; we have the transcripts. We can make them available to them — that is, our copies — if the Court that has the civil anti-trust case compels us to under Rule 37.

As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction.

THE COURT: All right.

MR. BLISS: The Herman Schwabe case dealt with the grand jury minutes and an attempt to get it in the wrong district court. That is not what we are talking about here.

THE COURT: It comes pretty close, doesn't it? The results of grand jury proceedings.

MR. BLISS: The minutes were in the possession of the court in Massachusetts, not in the District of Columbia.

THE COURT: Sure.

MR. BLISS: We are talking about our documents of which we have copies and transcripts of which we have copies.

THE COURT: Yes.

MR. BLISS: In the Seventh Circuit case, that statement by the court was simply in the context of whether a court should interfere with an ongoing grand jury. It says it is under the control of the Court, not a —

THE COURT: I have read your authorities, Mr. Bliss. I am still of the same mind.

There is one thing, gentlemen. That information will be given to you under a protective order, however. You are not to disclose it. You are to use it only for purposes of this litigation. Is there any reason why it needs to be disclosed to anybody other than you or your lawyer colleagues?

MR. BERMAN: No, your Honor. If the order can be that it only be disclosed to counsel for the petitioners to be used solely for the purposes of the litigation and applicable proceedings in that litigation, that is fine.

THE COURT: Prepare an appropriate order and include that protective order.

MR. THURSTON: Your Honor, a suggestion of perhaps one further protection. In previous proceedings of this nature it has been stipulated that when these grand jury transcripts go out they are to go back to the Government at the conclusion of the proceedings. Can we incorporate that?

THE COURT: Yes, I think we can incorporate that, too. Any objection to that?

MR. BERMAN: None at all, your Honor.

THE COURT: All right. That will be included.

Will you prepare an appropriate order?

MR. BERMAN: We will, your Honor.

THE COURT: All right, gentlemen. Thank you.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

Miscellaneous
No. 5706

CERTIFICATE

I hereby certify that I am a daly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 19 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, March 28, 1977, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, 1977.

Ben Newlander
Official Reporter

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY, *Petitioners,*

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1978
CERTIORARI GRANTED JUNE 19, 1978

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RELEVANT DOCKET SHEET ENTRIES UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS OIL COMPANY OF CALIFORNIA
and PHILLIPS PETROLEUM COMPANY,
Real Parties in Interest-Appellants,

vs.

UNITED STATES OF AMERICA
Respondent-Appellee

Case No. Misc. No. 5706 (WPG)

Date	Filings — Proceedings
4/15/76	Fld Petnr's Petn for production for inspection of Transcripts of G/J Testimony & documents produced purs to subp D/T.
	Fld petnrs' memo of P/A and affids in support. Received Applic for an ord of non-resident atty to appear in a specific case.
1/10/77	Fld Supplement to Petn; Fld Govt's response to petn.
1/31/77	Fld response of Douglas Oil Co. of Calif to Petn for product of G/J Docs.
2/ 1/77	Fld Memo of Real Pty in Interest Phillips Petroleum Co in oppos to mot for product of G/J Docs.
2/ 2/77	Ent min ord (MML) Trans hrg on pet for product of docs to cal of WPG for all fur prodgs. Mld copies to all ensl.
2/ 4/77	Fld petn'r not of hrg on said petn for production of G/J Docs for 2/10/77 at 2PM before Judge Gray.

Date	Filings — Proceedings
*3/ 4/77	Fld Deft Phillips Petroleum's Notice of Opposition to Petn to Impound GJ Notes, etc.
3/28/77	MIN ORD: Hrg mtn petnr for prdcn etc GJ Transcripts & ord grntg in part & overruling in part. ensl petnrs dir subm formal ord thereon.
5/ 5/77	Fld ORD (WPG) that petn for cy and inspec of G/J min is granted.
5/ 6/77	Fld note of hrg re form of order for procs 5/27/77, 10AM.
5/19/77	Fld Not of appeal by real pty in interest Douglas Oil Co of Calif. rak.
5/24/77	Fld real pty in interest not of mot & Mot rtnble 5/31/77-10am, for stay of enforcement of judgment pending appeal and for approval of supersedeas bond & Order w/memo of pts & auths in support.
5/31/77	Fld petnr's memo in oppost to mot for sty of enforcement of judgment.
5/31/77	Minute Order, Hearing Motion Defts Phillips & Douglas Oil to stay pending appeal & for supersedeas bond & order granting 30 day stay & order denying bond.
6/10/77	Fld. Appellants, Designation of Record on Appeal.
6/21/77	Fld. Bond on Appeal.

RELEVANT DOCKET SHEET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST *et al.*

v.

UNITED STATES OF AMERICA

DOUGLAS OIL COMPANY OF CALIFORNIA *et al.*

Real Parties in Interest

Date	Filings — Proceedings
6/15/77	FILED APLTS' MOTION FOR STAY PENDING APPEAL; MEMORANDUM IN SUPPORT. (to Schickele w/exhibits) 6/14/77
6/15/77	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.
6/29/77	Rec'd Reply Memorandum of Appellees (Petrol Stops Northwest, Gas-A-Tron of Arizona, and Coinoco) in opposition to appellants' motion for stay pending appeal. 6/28 (late)
6/30/77	Filed Order (Br & Cy, CJJ) upon due consideration of appellants' motion and appellees' opposition, the district court's order of May 17, 1977 is hereby stayed pending appeal and the Clerk shall expeditiously calendare *(sic)* the appeal upon completion of briefing.
9/19/77	Filed, as of Sep 15, 25 Aplts' Briefs (9/12/77).
10/17(77	United States doe *(sic)* not intend to file a brief or otherwise participate in this appeal per their letter of Oct 11, 1977 rec'd 10-17-77.
11/ 4/77	Filed 25 Aplees' Briefs (Petro Stops Northwest, et al) 10/31/77.
11/ 4/77	Filed motion of aples to supplement record on appeal. 10-31.

Date	Filings — Proceedings
11/ 7/77	Filed response of aplts in opposition to motion to aples to supplement record.
11/14/77	Filed reply or aples to response of aplts in opposition to motion to supplement record on appeal.
12/ 6/77	Rec'd, as of Dec 5, 25 Aplts' Reply Briefs (12/2/77) late, motion for ext pending.
12/13/77	Filed, as of Dec. 5, order (H) Upon due consideration, the motion to supplement the record is denied and the material in issue may be lodged with the court for such use as the panel which determines this appeal on its merits deems proper. Aplts are granted an ext of time through Dec. 5, 1977 in which to file their reply brief.
12/14/77	Filed, as of Dec. 5, 25 Aplts' Reply Briefs (12/2/77).
12/22/77	LODGED, SUPP'L RECORD, REC'D 11/14/77, PURSUANT TO ORDER OF 12/5/77.
2/14/78	As of Feb. 7, ARGUED & SUBMITTED BEFORE: CARTER, GOODWIN, CJJ, & SOLOMON, DJ.
3/24/78	As of Mar. 20, ORDERED OPINION (GOODWIN) FILED & JUDG TO BE FILED & ENTD.
3/24/78	As of Mar. 20, Filed opinion — AFFIRMED.
3/24/78	As of Mar. 20, Filed & Entd Judgment.
4/10/78	Filed aplts' motion for stay of mandate. 4/10 (G)
4/18/78	Filed, as of Apr. 14, order (G) Staying the issuance of mandate to April 28, 1978.

Date	Filings — Proceedings
4/18/78	Rec'd as of 4/17, appellees' Memorandum in opposition to motion for stay of mandate. 4/14 (see order of 4/14) (G)
5/ 8/78	Received as of May 5, 1978 Supreme Court notice of filing petition for certiorari on April 28, 1978, assigned No. 77-1547.
5/23/78	Filed certified SC order of 6/19/78 GRANTING petition for certiorari (copies sent to panel).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA, AND
COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF
CALIFORNIA,
PHILLIPS PETROLEUM COMPANY,
Appellants.

No. 77-2305

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company*, 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests.

After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggests no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute.

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[1] There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

[2] Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J.L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

We previously applied the Supreme Court's standards in *U.S. Industries, Inc., v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information, which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Corporate witnesses are vulnerable to their corporate em-

[3] The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

ployers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for impeachment as sufficient. *SEC. v. National Student Marketing,* 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harpor & Row Publishers, Inc.,* 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient. *Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc. v. Globe Ticket Co.,* 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra,* recently held that a grant of access with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce,* 323 F.2d 233, 238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh,* 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J.L. Simmons Co. v. Illinois,* 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the

district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not seek the materials merely for a general fishing expedition. It made a sufficient showing of particularized

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[4] We think that the Central District of California court was the proper district court to consider the issue. It was best situated to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh,* 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5] In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA; PHILLIPS PETROLEUM COMPNAY, *(sic)*

Appellants,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

No. 77-2305

ORDER

Before: HUFSTEDLER, Circuit Judge.

Upon due consideration, the motion to supplement the record is denied and the material in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper. Appellants are granted an extension of time through December 5, 1977 in which to file their reply brief.

(Signature)

United States Circuit Judge

No. 77-2305

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY,

Appellants,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

REPLY OF APPELLEES TO RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

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REPLY OF APPELLEES TO RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

INTRODUCTION

The lower court on May 17, 1977, granted appellees Petrol Stops, Gas-A-Tron, and Coinoco ("Petrol Stops") the same right of access to grand jury transcripts and documents previously granted to appellants Phillips Petroleum Company (hereinafter "Phillips") and Douglas Oil Company of California (hereinafter "Douglas"). Appellants seek to have this decision by the Honorable William P. Gray reversed. Appellees Petrol Stops on October 31, 1977, filed with their brief a motion to supplement the record. The two affidavits and excerpts from two depositions which appellees included as Exhibits A-D to their motion occurred *after* the May 17, 1977, Order of the lower court.

The May 17, 1977, Order of the lower court expressly provided that the grand jury materials could be used by Petrol Stops ". . . for the purpose of impeaching . . ." witnesses. (Order of May 17, 1977, at 3.) Events *subsequent* to the lower court's Order of May 17, 1977, have confirmed the importance of permitting appellees Petrol to use the grand jury materials already possessed by appellants Douglas and Phillips to establish the truth in the Arizona civil actions. Appellees Petrol Stops have submitted these new materials so that this Court might accurately assess the representations made to the district court and this Court by Douglas and Phillips.

1. *The Affidavits filed by a former government attorney subsequent to the designation of the record dispute appellants' representations that the grand jury materials are not relevant to the private antitrust civil*

actions in Arizona being prosecuted by appellees against Douglas and Phillips. Exhibits A and B to appellees motion are affidavits by Jonathan Nave, an attorney for the Antitrust Division of the U.S. Department of Justice who helped prepare the indictment and civil complaint against Douglas and Phillips. The August 26, 1977, affidavit, Exhibit B to Appellees' Motion, states that "the Government obtained considerable information concerning retail price-fixing of rebrand gasoline." (at 3.) Appellees allege, *inter alia* in their complaints in the Arizona actions that appellants Phillips, Douglas, and other co-conspirators had conspired to fix the retail price of gasoline sold in Washington, Oregon, California, and Arizona." Yet appellants Douglas and Phillips argued to the lower court that the ". . . question here is whether or not the materials sought by these plaintiffs (appellees Petrol Stops) are relevant . . ." (Transcript of Proceedings, March 28, 1977, at 9.) They have made the same argument to this Court. (Appellants' Brief at 8-12.) Since only Douglas and Phillips have actually seen and reviewed the grand jury materials, it is important for this Court to have the affidavit of Jonathan Nave to assess accurately the appellants' representations that the grand jury materials are irrelevant. Nave's affidavit demonstrates that Judge Gray's decision that the grand jury materials were relevant to appellees Arizona actions was correct.

2. *Appellant Douglas' acts subsequent to the March 28, 1977, hearing belie appellants' argument that the grand jury transcripts and documents are not relevant to the private antitrust civil actions in Arizona being prosecuted by appellees against Douglas and Phillips.* Douglas urges this Court to find that the grand jury materials are not relevant to appellees' Arizona actions. This argument is made in spite of the fact that Douglas' counsel used the same grand jury transcript in preparing

William J. Martin II for his deposition on October 25-26, 1977, in Los Angeles. If the grand jury materials were in fact irrelevant, counsel for Douglas would not have used them in preparing his clients' witness.

3. *Douglas employees have denied, in depositions taken after Judge Gray's decision, engaging in any of the conduct which resulted in the indictment and companion civil antitrust case established by the U.S. Government.* Phillips and Douglas pled *nolo contendere* to the indictment and a consent decree was accepted by Judge Harry Pregerson of the U.S. District Court for the Central District of California. Yet in Mr. Janecek's September 28, 1977, deposition, Exhibit C to appellees' motion, the testimony appears that he never had any conversations with William J. Martin, II to determine whether there had been contact with competitors of Douglas concerning the price at which gasoline was to be sold. Similarly, Mr. George Hopwood denied during his September 26, 1977, deposition, Exhibit D to appellees' motion, denied ever having any of the conversations listed by date and participants in the government's Bill of Particulars. These direct contradictions underscore the importance of affirming the lower court's May 17, 1977, Order permitting appellees to impeach testimony by Douglas and Phillips personnel.

4. *Rule 10(e) of the Federal Rules of Appellate Procedure provides for the modification of the record on appeal.* Questions regarding errors or inaccuracies "shall be submitted to and settled by that court and the record made to conform to the truth." (*Id.*) *Heath v. Helmick*, 173 F.2d 156 (9th Cir. 1949). However, Rule 10(e) goes on to provide that "[a]ll other questions as to the form and content of the record shall be presented to the court of appeal." That this authority to augment the record lies only in this Court was decided by this Court in

Munich v. United States, 330 F.2d 774 (9th Cir. 1964). Appellees Petrol Stops have presented a different question than mere correction of the record to this Court by filing their "Motion of Appellees to Supplement Record on Appeal" and "Proposed Order."

The question is whether appellants should be permitted to argue that the grand jury materials are not relevant and *then*, after the lower court's decision, to take actions which refute that argument. Appellants had the grand jury materials before they argued the relevancy question to the lower court, but it was only *after* the time for designation of the record on appeal had passed that their actions contradicted the argument. Appellants might have argued that circumstances changed between the time of the lower court's Order and their inconsistent actions. But appellants do not make that argument. Instead they repeat the relevancy argument to this Court in their Brief at 8-12.

Under Rule 10(e) this Court has the express authority to modify or supplement the record on appeal. That is what appellees Petrol Stops seeks in its instant motion.

5. *This Court also has the inherent power to supplement the record beyond the authority granted in Rule 10(e).* In *Phillips Petroleum Company v. Williams*, 159 F.2d 1011 (5th Cir. 1947) the court considered its inherent power within the context of revisions of its local rules and the predecessor to Rule 10(e):

> This court has ample authority, too, to supplement the record if there has been omitted from it matter which is deemed necessary or appropriate in the decision of the case. (at 1012)

CONCLUSION

The material presented to the Court by appellees' motion to supplement the record confirms the relevancy of the grand jury materials to appellees' civil actions in Arizona. Exhibits A-D of Petrol Stops' motion demonstrates that appellants have taken actions after the lower court's decision which belie their argument that the materials are not relevant. This Court has the authority, either under Rule 10(e) or through the exercise of its inherent power, to supplement the record pursuant to appellees' motion.

DATED: November 11, 1977

Respectfully submitted,

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No. 77-2305

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY,

Appellants.

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

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RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

On or about October 31, 1977, Appellees Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco served a Motion of Appellees To Supplement Record on Appeal. Appellees wish to supplement the record in this case (Misc. No 5706 in the Central District of California) with two affidavits filed in another case (Civ. No. 75-974-HP in the Central District of California) and with excerpts of two unsigned deposition transcripts in yet another case (Civ. No. 73-212 TUC-JAW in the District of Arizona). Each of the items Appellees wish to add to the record in this case originated after the appeal was taken to this Court from the District Court's order of May 17, 1977. For the reasons stated below, Appellants oppose the motion and urge that it be denied.

Rule 10(e), Federal Rules of Appellate Procedure, provides the procedure for supplementing the record on appeal. It states:

> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 10(a) defines the record on appeal. It states:

> The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Appellees in their present motion are not attempting to provide something that has been "omitted from the record by error or accident" nor are they attempting to correct something that has been "misstated therein." In fact, they are attempting to augment the record by adding matter wholly extraneous to the record, matter that has never been a part of the record in this case in the district court below and even matter that is involved in an action in a wholly different court than below — and that matter is not even a part of the record in that different district court.

The purpose of Rule 10(e) is to provide for bringing to this Court's attention matters that were in fact part of the case being reviewed, but that have been omitted from the record by error or accident or have been misstated in the record.[1] That rule was clearly not designed to permit a party to go rummaging through the world at large for whatever he thinks might be of some benefit to him.

The reason for the rule is simple and obvious: this Court is called upon to review a decision made below. To determine whether the judge below made the correct ruling this Court must have the same data that he had or at least so much of that data that the parties deem relevant. Judge Gray had none of the materials Appellees wish to introduce to this Court before him when he ruled. He obviously did not consider them when he ruled. In reviewing Judge Gray's order this Court should have before it those pleadings and exhibits that were presented to Judge Gray and an exposition of the controlling law. This Court is not being called upon to consider what Judge Gray might have ruled if he had a record different than the one he actually had. This Court is called upon to rule upon the same record Judge Gray had.

[1] A proper utilization of Rule 10(e) is the motion of August 8, 1977, in which this Court was asked to permit inclusion of the Reporter's Transcript of the hearing before Judge Gray in the court below on Appellees' petition, which Transcript had been "omitted from the record by . . . accident."

Moreover, the proffered material is wholly without any probative value in this case. Exhibit A, the first Nave affidavit, merely states who the affiant is, why he filed his affidavits in Civ. No. 75-974-HP and that the original second affidavit was filed *in camera*. Exhibit B, the second Nave affidavit, recites allegations about matters investigated by the government, but for which no indictment was returned. There is no indication in that affidavit that either Douglas Oil Company of California or Phillips Petroleum Company is the subject of any of the allegations, nor that the allegations were based upon grand jury testimony of employees of either of those companies nor that the allegations were based upon documents provided by either of those companies. Documents were provided by many more companies than just Douglas and Phillips. Exhibits C and D, the deposition transcript excerpts, are unsigned portions of testimony of two present Douglas employees, depositions taken in a civil action pending in Arizona, taken after the Order appealed from in this case was entered and taken after the transmittal of the record to this Court. Whatever their relevance and value may have been had they been presented to Judge Gray, they are completely irrelevant to a review of the May 17, 1977 Order.

To grant the motion of Appellees to supplement the record by inclusion of those extraneous materials would completely disrupt the orderly handling and considera-

tion of appeals. The appellate function is to review what transpired in the court below and measure it against controlling legal principles. The Appellees chose to bring on their petition when they did and they presented their case as they saw fit. Based on their petition and presentation, the district court ruled. There must be some finality to trials and hearings. Litigants should not be permitted to continue introducing newly created, post-judgment evidence after the court has ruled and an appeal commenced. Some of Appellees' proffered material came into existence even after the opening brief was filed in this appeal.

For the reasons that the proposed augmentation is wholly outside the record of the case below and beyond the coverage of Rule 10, that the material was created after the Order appealed from was entered and the appeal commenced and in proceedings other than those in the court below, it is urged that the motion of the Appellees to supplement the record on appeal be denied.

DATED: November 4, 1977.

Respectfully submitted,
EVANS, KITCHEL & JENCKES, P.C.

By HAROLD J. BLISS, JR.

Harold J. Bliss, Jr.
Attorneys for Defendant-Appellant Phillips Petroleum Company

On Behalf of Phillips Petroleum Company and Douglas Oil Company of California

No. 77-2305

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY,

Appellants.

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL; PROPOSED ORDER

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MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

Appellees Petrol Stops Northwest, Gas-A-Tron, and Coinoco (hereinafter "Petrol Stops") respectfully move this Court for an order to supplement the record on appeal on the grounds that significant events have occurred since the record on appeal was designated on June 10, 1977.

On May 17, 1977, the Clerk of the U.S. District Court for the Central District of California entered the Order of the Honorable William P. Gray, which is the subject of the appeal by Phillips Petroleum Company (hereinafter "Phillips") and Douglas Oil Company of California (hereinafter "Douglas"). This Court on June 30, 1977, stayed the district court's order of May 17, 1977, pending appeal and the Clerk was directed to expeditiously calendar the appeal upon completion of briefing.

The May 17, 1977, Order, which is the subject of the instant appeal, grants to appellees Petrol Stops the same right of access to grand jury transcripts and documents previously granted to Douglas and Phillips in connection with a criminal antitrust prosecution, terminated by pleas of *nolo contendere* on December 3, 1975. United States v. Phillips, et al., Criminal No. 75-377 MML. The companion civil action filed by the Department of Justice Antitrust Division was settled pursuant to a proposed consent decree U.S. v. Phillips, et al., Civil No. 75-974-HP. During the consideration by the Honorable Harry Pregerson of whether the proposed consent decree was in the public interest, a former attorney for the Department of Justice Antitrust Division, Jonathon P. Nave, submitted two affidavits challenging the representations made to the court by the government and the defendants, incuding appellants Phillips and Douglas. These affi-

davits, dated August 22, 1977, and August 26, 1977, directly contradict the answers to interrogatories filed by Phillips and Douglas in the private Arizona actions in which Petrol Stops are plaintiffs. *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, *Gas-A-Tron of Arizona and Coinoco v. Union Oil Company of California*, et al., Civil No. 73-191 TUC-WCF. Since Judge Gray granted Petrol Stops access to these grand jury transcripts and documents in part to enable appellees to impeach these false answers to interrogatories, these affidavits should be considered by this Court.

The affidavits were prepared *after* the time for appellants and appellees to designate the record pursuant to Rule 10 of the Federal Rules of Appellate Procedure. Appellees have included these affidavits as Appendix A and Appendix B to their Brief filed simultaneously with this motion.

Similarly, depositions of two employees of appellant Douglas occurred on September 26-28, 1977; again, *after* the date for designation of the record on appeal. Testimony developed during these depositions again bears directly upon the accuracy of the answers to interrogatories filed by Douglas and Phillips in the Arizona civil actions. Therefore, this testimony should be before this Court to enable it to assess appellees' particularlized need for access to the grand jury transcripts and documents to establish the truth in the face of false answers to interrogatories. Appellees have included portions of these two depositions as Appendix C and Appendix D respectively to their Brief filed simultaneously with this motion.

Copies of Appendixes A, B, C, and D are attached to this motion for the convenience of the Court.

DATED: October 31, 1977

Respectfully submitted,

BERMAN & GIAUQUE
DOUGLAS J. PARRY
GORDON STRACHAN
500 Kearns Building
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

By: GORDON STRACHAN
Gordon Strachan
Attorneys for Appellees
Petrol Stops Northwest;
Gas-A-Tron of Arizona; Coinoco

PROPOSED ORDER TO SUPPLEMENT THE RECORD ON APPEAL

Upon the motion of appellees for an order supplementing the record on appeal, and good cause appearing,

IT IS ORDERED that the record on appeal be supplemented by the addition of the Affidavits of August 22, 1977, and August 26, 1977, of Jonathon P. Nave, and the excerpts from the depositions of Lionell J. Janecek of September 28, 1977, and George E. Hopwood of September 26-27, 1977, attached to appellees' Brief as Appendixes A, B, C, and D respectively.

DATED: .....

.....
United States Court of Appeals

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; AND MACMILLAN RING-FREE OIL CO., INC. *Defendants.*	AFFIDAVIT OF JONATHON P. NAVE Civil No. 75-974-HP

The undersigned, Jonathon P. Nave, being duly sworn, does swear and testify as follows:

1. My name is Jonathon P. Nave. I am an attorney duly licensed in California and admitted to practice before the Courts of the State of California and this Court. During the period from October 1971 through September 15, 1974, I was a staff attorney for the United States of America assigned to the Antitrust Division office of the Department of Justice in Los Angeles, California. During a portion of this period, beginning approximately in the Fall of 1972 and extending to September 15, 1974, a portion of my duties included investigation into alleged antitrust violations concerning the gasoline industry.

2. I have been provided a copy of the Competitive Impact Statement filed by the United States in Civil No. 75-974-HP, and have been asked by counsel for *amicus curiae,* Petrol Stops Northwest and Gas-A-Tron, to comment on the statements contained therein.

3. I have examined the Competitive Impact Statement, and believe the Court is entitled to additional

information concerning the representations contained at page 5, lines 15 through 23, and particularly line 20, and page 6, lines 1 through 10, and particularly line 5 therein, before deciding whether the proposed consent decree is in the public interest.

4. Federal Rules of Criminal Procedure, Rule 6(e) "Secrecy of Proceedings and Disclosure" appears to apply to the information gained by me not only from witnesses appearing before a grand jury, but also to information gained and compiled pursuant to my grand jury authority. For that reason, the particular information is not contained in this affidavit. It is supplied to the Court, with a copy to the attorneys for the United States, for inspection by the Court *in camera.*

5. Further affiant sayeth not.

Dated: August 22, 1977.

JONATHON P. NAVE

Jonathon P. Nave

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

On the 22nd day of August, 1977, before me, a Notary Public in and for said County and State, personally appeared Jonathon P. Nave, known to me to be the person who executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

TSUYOKO OTA

[Notarial Seal] Notary Public in and for Said County and State.

My Commission expires Jan. 16, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; AND MACMILLAN RING-FREE OIL CO., INC. *Defendants.*	AFFIDAVIT OF JONATHON P. NAVE Civil No. 75-974-HP

COMES NOW, JONATHON P. NAVE, and being duly sworn, deposes and says:

1. I am the same person who filed an affidavit with the Court in the above-entitled matter on August 22, 1977. This affidavit is the affidavit referred to in paragraph 4 therein.

2. This affidavit is submitted in connection with that portion of the Government's Competitive Impact Statement filed in the above-entitled case which reads:

> ". . . Since the Government did not develop evidence or price-fixing with respect to gasoline other than rebrand gasoline, . . ." (Page 5, lines 20-21).

3. During my employment by the United States Department of Justice, I received and/or obtained information concerning the operation of refiners and marketers of gasoline in the five western states of California, Oregon, Washington, Arizona and Nevada. This information may be classified into several categories:

a. Documents and testimony from various individuals and corporations pursuant to grand jury subpoenae.

b. Documents and other information received from individuals and companies that were not furnished in response to grand jury subpoenae.

c. Interview notes, memoranda, and transcripts of interviews.

d. Compilations derived from interviews, testimony and documents.

e. Staff memoranda.

4. During staff discussions of the investigation, those of us assigned to the investigation decided to concentrate on rebrand "rack" pricing first, since that was the first particular complaint brought to the attention of the Government. However, nearly all the persons who furnished documents or provided information concerning "rack" pricing also provided information and/or documents concerning other potential violations of the antitrust laws. Included in these other areas were:

a. Retail pricing by both rebranders and majors,

b. The effect of exchange agreements on wholesale and retail rebrand sales, and

c. The actions of certain defendants to prevent a major rebrander from obtaining an import quota from the Oil Import Appeals Board.

The documents, notes and memoranda on each of these areas are or were contained in Government files. Some were returned to the companies that supplied them while I was still employed by the United States.

5. During the period prior to the indictment and filing of this civil suit, the Government obtained con-

siderable information concerning retail price-fixing of rebrand gasoline. In fact, more information was received from participants involved in retail rebrand price-fixing than any other aspect of the investigation. Included in the information received by the Government, among other things, were:

a. Minutes of trade groups meetings (composed of rebranders, some major dealers, some major distributors, and refiner representatives), and testimony concerning straight forward discussions at those meetings of the dates and amounts of retail price restorations.

b. Interviews and testimony of rebrand operators concerning discussions and agreements to increase retail rebrand prices, mostly by telephone.

c. Retail pricing documents of a refiner obtained in connection with its attempts to obtain retail price restoration in order to ensure the success of wholesale price increases.

d. Testimony from representative of at least one refiner that retail price restorations were enforced by pressuring customers who had not restored retail prices. Recipients of such calls testified to receiving them. The refiner representative also indicated to us that a strong retail market was a necessity before a wholesale "rack" price increase could be expected to "hold."

e. Transcripts and interviews concerning communications and agreements to raise retail prices just prior to Phase One of the Government's price freezes, as a result of and following information obtained (allegedly from the Executive Office of the President) prior to the price freeze. This information was given to the grand jury by a representative of a refiner who participated in discussions concerning whether or not the information should be passed on to competitors and

customers. Customers of this refiner testified they received such calls.

6. We also received information concerning certain activities of major refiners concerning retail price increases, occasionally in conjunction with rebrand wholesale pricing, and invariably involving the same persons identified by others as participants in the conspiracy to increase the wholesale "rack" price. Included in this class of information are:

a. Interviews of an employee of a major, who discussed being contacted by and contacting representatives of other majors and rebranders concerning the prices charged by individual stations. As an example of such a communication, he would call a competitor, or receive such a call, and ask "Do you have a special deal going for station X?" If he received such a call, and did not have some special deal for that station, he would inform the service representative in charge of the offending dealer for the purpose of having the representative visit the dealer to persuade the dealer to raise his low prices.

Others, including the representative of a trade group, stated he made similar calls.

A representative for one of the defendants also made such calls and received such calls. That employee, a former service representative and area representative of a major, indicated that this was a wide-spread industry practice.

Several individual station dealers indicated that the contacts from the service representative took a wide variety of forms, such as promises to stand up for the dealer on restroom complaints or other complaints that could cause a dealer to lose his lease. One such dealer indicated that his lease contained a

"three-complaint" clause, allowing the refiner to cancel his lease on receiving three complaints of unclean restrooms.

b. A transcript of a deposition by a former official of a major, in which the official alleged meetings occurred regularly among representatives of majors at various places in California, Oregon, and Washington where specific information concerning each others low priced stations was exchanged with the intent that each company would pressure its low-price stations to increase prices.

7. There were also a number of items relating to the effect of exchanges on rebrand pricing and supply. Among these are:

a. A project study of a major in which, as a part of an attempt to increase the return on investment at the retail level, an economic study of exchanges which fed the "bootleg market" was urged. The study is dated shortly before one of the exchange partners began to limit the supply and distribution points of its two largest distributors.

b. A memorandum from the head of the exchange department to the head of the wholesale marketing department of a California refiner, explaining why and how exchanges and bulk sales can and should be used to create a "floor" below which rebrand rack prices would not fall, and explaining why they should not solicit the wholesale rack business of other refiners. This latter injunction was similar to statements received from executives of other refiners.

8. The Government also investigated the activities of several refiners in opposing a finished product import quota for an aggressive rebrand marketer.

In the late 1960's, a California marketer was able to secure a gasoline supply from a midwest refiner. The Government received a number of documents and testimony that several refiners engaged in joint activities to oppose the necessary application for an inter-district import quota from the Oil Import Appeals Board.

Also included in documents produced to the Government were contemporaneous notes of a telephone conversation between the rebrander and the refiner. The general tenor of the conversation was that the rebrander could not pay the amount it owed for the gas it had purchased because it was unable to sell it for a higher price in California due to the low price being charged at the rack by a competitor. According to the notes, the refiner indicated that he was coming to California in the next few days and would talk to the competitor about raising the rack price.

There were also statements indicating that several refiners contracted with the refiner (after the rebrander received its import quota) to produce jet fuel rather than gasoline, for which the small local refiners who were eligible for the "set aside" portion of the Government's jet fuel contracts would bid and exchange jet fuel for gasoline to be delivered to the midwest refiner on the west coast. The local refiners were then able to control the distribution points (hence the transportation costs and amount available in a given area) and were able to negotiate a stable value for the gasoline due to the ratio expressed in the exchange agreement.

9. The Government also received a number of communications and statements from individuals connected with the oil industry, concerning other potential violations of the antitrust laws. Included among these were:

a. Allegations that refiners were imposing limits on "crosshauling," including a tape by a major dealer

in which the service representative explained to him that he would not be allowed to "crosshaul" in the Los Angeles market because the practice had the effect of ruining otherwise stable areas in the Los Angeles Basin.

b. An allegation by a former employee of a smaller oil company that he had attended a meeting in which representatives of most of the major oil companies agreed to include the cost of credit cards in the price of crude oil so that the retail price differential between majors who were going to offer credit cards, and rebranders, who would not offer credit, would not increase.

10. I have not worked for the United States since September, 1974. Unfortunately, my memory is not perfect. Therefore, this affidavit is made in accordance with my recollection of various aspects of the investigation conducted by the Government, most of which was conducted prior to Summer, 1974.

11. Further affiant sayeth not.

DATED: August 26, 1977.

JONATHON P. NAVE

Jonathon P. Nave

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

On this 26th day of August, 1977, before me, a Notary Public in and for said County and State, personally appeared Jonathon P. Nave, known to me to be the person who executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

JOERLINE MIRALLES

Notary Public in and for Said County and State.

OFFICIAL SEAL
JOERLINE MIRALLES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires APR 7, 1981

APPENDIX C

[As submitted by respondents]

BE IT REMEMBERED that pursuant to notice for taking depositions in the above styled and numbered cause, the deposition of LIONELL J. JANECEK was taken upon oral examination at the law offices of Messrs. Latham & Watkins, 660 Newport Center Drive, in the City of Newport Beach, County of Orange, State of California, before Peter L. DiCurti, a Notary Public in and for the County of Pima, State of Arizona, on the 28th day of September, 1977, commencing at the hour of 11:10 a.m. on said day, on behalf of the Plaintiff in a certain cause now pending in the District Court for the District of Arizona.

MR. PARRY: Can we go on the record?

MR. NORRIS: On the record. In view of the fact that this deposition is being taken in Newport Beach, California, I would suggest to the parties that it might be well to stipulate that the deposition can be signed before any Notary authorized to administer oaths in this jurisdiction, rather than having it signed before the Reporter who took the deposition, if that's acceptable to all parties.

MR. DORMAN: Is that acceptable, Doug?

MR. PARRY: Agreed.

* * * * [page 3]

did I at that time, have any reason to question the answer that the coordinator provided?

Q (By Mr. Parry) Okay. I will ask that question. What is the answer?

A I had no reason to question it.

Q Did you make any investigation, independent investigation of Mr. Dan Myers to determine whether the answer was true or not?

A I worked with Mr. Myers on this collection of data.

Q Okay. Specifically, as to Interrogatory No. 82, dealing with the discussions with major oil companies concerning the rack and spot price of gasoline, what did you do in working with Mr. Myers?

A Well, as to being able to verify to myself that the questions had been asked of those people, or parties, who would have that knowledge, I would have asked two or three or four of them just to make sure that they had been asked the question, and that they could substantiate the answers that were provided.

A Did you —

Q Yes.

Q — ask two or three or four of them?

A Yes.

* * * * [page 16]

during May of 1974?

A I believe Mr. Martin was no longer with the company on that date.

Q Your best recollection is that you did not contact him concerning the Answers *(sic)* to Interrogatories, any Answer to any Interrogatories 77-82?

A To the best of my recollection, no.

Q Did you make any search of any documents or records of Douglas Oil Company to determine what the answers to, whether the answers given to you to Interrogatories 77-82 were correct?

MR. DORMAN: Are you asking him specifically whether he personally, or whether Dan Myers?

MR. PARRY: No, he personally.

MR. DORMAN: Okay.

A And the question was dealing with records?

Q (By Mr. Parry) Yes, any documents.

A No.

Q Do you know whether Dan Myers made any investigation of any records of Douglas Oil Company to determine the Answers to Interrogatories 77-82?

A No, I don't know.

Q Did Mr. Myers tell you that he had gone through any file to determine the Answers to those Interrogatories?

* * * * [page 21]

not in evidence.

A Any other oil company? Are you talking about any other oil company as being a manufacturer or refiner of product?

Q (By Mr. Parry) Any, any other oil company. The question is whether you had any conversation with Mr. Martin concerning any agreement between Douglas and any other oil company concerning the price at which Douglas and that other oil company would resell refined petroleum products at wholesale in Washington, Oregon or California?

MR. MUNTER: Objected to as assuming a fact not in evidence.

A With the emphasis, as you have placed on the words, no, and thank you, because I didn't hear that.

Q (By Mr. Parry) Well, if I didn't put an emphasis on those words, and just said them all in a monotone, would your answer be different?

A Well, I think of oil companies as being Armour Oil Company, James White Oil Company, and --

Q My question includes those.

A I understand that. But you are talking about any other oil company for the resale by these two companies, and —

Q Correct.

* * * * [page 89]

A And the answer is absolutely no.

Q It would also include —

A If you are talking about the sale, or sale for resale, the answer is obviously probably yes.

Q But no, I am not. And I am including Douglas, Powerine.

A No.

Q Do you recall ever having a conversation with Mr. Martin concerning the availability of refined petroleum products to, for resale by any company, to any independend, no, no independent, rebrand marketer in Washington, Oregon or California?

MR. MUNTER: Could I hear the question? I didn't understand.

(Pending question read by the Reporter.)

MR. PARRY: Let me rephrase the question, because I want to narrow it down.

Q (By Mr. Parry) Do you recall of any conversations which you had with Mr. Martin concerning the availability of refined petroleum products for resale to rebrand marketers of refined petroleum products in Washington, Oregon or California, other than in relationship to a purchase, or an attempt to purchase refined petroleum products from Douglas by a customer of Douglas?

MR. DORMAN: I object to the form of the

* * * * [page 90]

with Don Parker.

Q In verifying the Answers to Interrogatories do you solely rely on Mr. Myers' representation to you that any single answer to Interrogatory was true, without you making a personal investigation, other than through Mr. Myers?

A I believe you have asked, and I have answered that.

Q The answer is yes?

A Yes. Wait, no, no, no, no. Read that question, because — read the last question, not the question he just asked, but the very last question.

MR. LEVY: It goes back, it's the whole question of Dan Myers.

Q (By Mr. Parry) Well, what I am really trying to ask is, originally you said —

A Did I rely on him, is that your question?

Q My question was whether there were some Answers to Interrogatories that you didn't make any independent investigation or verification whatsoever, but relied solely on Dan *(sic)* Myers' representations to you?

A I don't think there were any questions, so the answer was not yes, it's no.

MR. PARRY: Then I have no further questions.

* * * * [Page 93]

STATE OF ARIZONA }
COUNTY OF PIMA } ss:

BE IT KNOWN that I, PETER L. DICURTI, took the foregoing deposition pursuant to notice at the time and place stated in the caption hereto; that I was then and there a Notary Public in and for the County of Pima, State of Arizona; that the witness, LIONELL J. JANECEK, before testifying was duly sworn to testify the truth, the whole truth and nothing but the truth, by a duly qualified Notary Public in and for the County of Orange, State of California; that the testimony of said witness was reduced to writing under my direction; that the foregoing 94 pages contain a full, true and correct transcription of the notes of said deposition.

I FURTHER CERTIFY that I am not of counsel nor attorney for either or any of the parties to said action or otherwise interested in the event thereof, and that I am not related to either or any of the parties to said cause.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal of office this 6th day of October, 1977.

_____
Notary Public

My *(sic)* Commission Expires:
February 2, 1981.

• • • • [Page 95]

APPENDIX D

[As submitted by respondents]

BE IT REMEMBERED that pursuant to notice and stipulation for taking depositions in the above styled and numbered cause, the deposition of GEORGE E. HOPWOOD was taken upon oral examination at the law offices of Messrs. Latham & Watkins, 660 Newport Center Drive, in the City of Newport Beach, County of Orange, State of California, before Peter L. DiCurti, a Notary Public in and for the County of Pima, State of Arizona, on the 26th day of September, 1977, commencing at the hour of 10:30 a.m. on said day, on behalf of the Plaintiff in a certain cause now pending in the District Court for the District of Arizona.

GEORGE E. HOPWOOD

a witness produced by the Plaintiff as an adverse party on cross examination, after having been first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

CROSS EXAMINATION

BY MR. PARRY:

Q Mr. Hopwood, my name is Douglas Parry. I represent the Plaintiff, Petrol Stops Northwest, in a lawsuit which involves the company by whom

• • • • [Page 3]

of Douglas Oil Company in attendance?

A I think all of them.

Q Can you recall in 1970, aside from yourself, who attended the Pacific Oil Conference in Nevada on behalf of Douglas Oil Company?

A I did, and I think Bill Miller, and I'm not sure who else, but there may have been others. I'm not sure.

MR. PARRY: Could you read back my question, please?

(Question, beginning on line 3, ending line 5, read by the Reporter.)

A I'm not really sure. I didn't know how many.

Q (By Mr. Parry) Let me refresh your — ask a few more questions.

MR. DORMAN: Just so the record is clear, while you were reading back the question I was asking him specifically to, can he peg that date of 1970 in the oil conference to a particular person attending with him, if he was sure of that, because that was precisely what you asked.

MR. PARRY: Okay. Let me give some background.

Q (By Mr. Parry) In the 1970 conference, as I understand it, it was held in Reno, Nevada.

* * * * [page 208]

Do you recall that being where it was held?

A Not in Reno, no.

Q Sparks, Nevada?

A Sparks.

Q At this conference, was that the first time you had met a man by the name of Ken Galligan?

A I don't recall meeting Ken Galligan.

Q Have you ever met Ken Galligan?

A I met him once, to my knowledge.

Q Where was that?

A In the Courtroom of the United States against George Hopwood.

Q You don't recall meeting him in the hospitality room of the —

A I don't recall meeting him, no.

MR. PARRY: Can you staple this and mark it next, please?

(Plaintiff's Douglas Exhibit No. 7 stapled and marked for identification.)

MR. WELLS: I wonder if we could have Mr. Galligan's last name spelled, please?

MR. DORMAN: G-a-l-l-i-g-a-n.

Q (By Mr. Parry) Referring to — let me ask him a couple of introductory questions, and then you can have it.

Referring to Exhibit 7, which are three pages

* * * * [page 209]

Q Aside from the fact that you might not remember the names of the individuals that you went to lunch or dinner with, was there any other reason that you did not write down the names of the individuals?

A No other reason whatsoever.

Q Where are the Exhibits, please?

(Exhibits pointed out by the Reporter.)

Q To your recollection, Mr. Hopwood, have you ever had a telephone conversation with Mr. Kenneth Galligan?

A Not that I recall, no.

Q Is your recollection such that you can deny that you have ever had a telephone conversation with Mr. Galligan?

A Yes.

Q Do you know with, or by whom, Mr. Galligan was employed in the period 1970 — 1972?

A Yes. Well, I'm not sure about '72, but it was my understanding he was employed by Powerine in 1970.

Q On what do you base that testimony?

A Based on the testimony in Court when I was on trial.

Q Have you ever had any discussions with Mr. Martin concerning Mr. Kenneth Galligan?

• • • • [page 289]

STATE OF ARIZONA }
County of Pima } ss:

BE IT KNOWN that I, PETER L. DICURTI, took the foregoing deposition pursuant to notice and stipulation at the time and place stated in the caption hereto; that I was then and there a Notary Public in and for the County of Pima, State of Arizona; that the witness, GEORGE E. HOPWOOD, before testifying was duly sworn to testify the truth, the whole truth and nothing but the truth by a duly qualified Notary Public in and for the County of Orange, State of California, that the testimony of said witness was reduced to writing under my direction; that the foregoing 367 pages contain a full, true and correct transcription of the notes of said deposition.

I FURTHER CERTIFY that I am not of counsel nor attorney for either or any of the parties to said action or otherwise interested in the event thereof, and that I am not related to either or any of the parties to said cause.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal of office this 5th day of October, 1977.

_____
Notary Public

My Commission Expires:
February 2, 1981.

• • • • [page 368]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

ORDER
Miscellaneous
No. 5706

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S. v. Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorable William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders *(sic)* and adjudges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the

indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al. v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4th day of May, 1977.

WILLIAM P. GRAY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

PETROL STOPS NORTHWEST, et al., *Petitioners.*	
vs.	
UNITED STATES OF AMERICA, *Respondent.*	Miscellaneous No. 5706
DOUGLAS OIL COMPANY OF CALIFORNIA, et al., *Real Parties In Interest.*	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 28, 1977

BEN NEWLANDER
Official Reporter
404 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
(213) 622-5545

APPEARANCES:

On behalf of petitioners:

BERMAN & GIAUQUE
500 Kearns Building
Salt Lake City, Utah 84101, by
DANIEL L. BERMAN, ESQ.
DOUGLAS J. PARRY, ESQ.

On behalf of respondent:

ANTITRUST DIVISION
U. S. Department of Justice
1444 United States Court House
312 North Spring Street
Los Angeles, California 90012, by
RAYMOND P. HERNACKI,
Deputy Attorney General

On behalf of Douglas Oil Company:

LATHAM & WATKINS
555 South Flower Street
45th Floor
Los Angeles, California 90071, by
MORRIS THURSTON, ESQ.

On behalf of Phillips Petroleum Company:

EVANS, KITCHEL & JENCKES, P.C.
363 North First Avenue
Phoenix, Arizona 85003, by
HAROLD J. BLISS, JR., ESQ.

and

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014, by
JOHN H. BRINSLEY, ESQ.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 28, 1977; 2:00 P.M.

THE CLERK: Item No. 18, Miscellaneous 5706, Petrol Stops Northwest v. United States of America and others. Motion of petitioner for production, inspection, et cetera of grand jury transcripts.

MR. THURSTON: Good morning, your Honor. I am Morris Thurston of Latham & Watkins for I guess the real party in interest Douglas Oil Company.

THE COURT: All right. You are the fellow that wrote that very able brief.

MR. THURSTON: I am not certain about that, your Honor. I have here also Mr. Bliss. I am not sure whose brief you are referring to so I hate to take credit for his work. Mr. Bliss represents Phillips Petroleum.

THE COURT: Good afternoon, Mr. Bliss.

MR. BLISS: Good afternoon, your Honor.

MR. PARRY: Your Honor, my name is Douglas Parry. This is Daniel Berman. We represent the petitioners in this action.

THE COURT: Yes.

MR. HERNACKI: Raymond Hernacki on behalf of the Antitrust Division. I think I am just a bystander in this proceeding, your Honor.

THE COURT: All right. Gentlemen, I will be glad to hear such arguments as you might find appropriate. Rather than have you argue in a vacuum, suppose I give you the Court's impressions, having read your papers.

In the first place, I think this Court has full jurisdiction to consider the matter. The defendants Phillips and Douglas raised that point. As a matter of fact, if Judge

Holtzoff is right, and he was a pretty good judge in the District of Columbia, this court would be the only one that would have jurisdiction. That is what he said in the case of Herman Schwabe, Inc. v. United Shoe Machinery.

And the Seventh Circuit in the In Re April 1956 Term Grand Jury also expressed the view that the court where the grand jury sits is the one that has jurisdiction. I think there is considerable reason for that. Although personally I have no information about the considerations of problems that the grand jury had when they considered this matter, presumably the judge who was the criminal duty judge at that time might well have had some knowledge of what the grand jury was considering and the problems in connection with it. But certainly the criminal duty judge of this court is better able to determine the sensitivity of grand jury proceedings than is a court in another district.

In any event, I conclude that I have jurisdiction over the matter and am disposed to proceed with that in mind.

With respect to the merits, the Procter & Gamble case says that the petitioners must show a particularized need. As I think it was Justice Douglas in that case said, this requires a lot of balancing.

First, it seems to me that seeking to obtain this information for purposes of impeachment constitutes a valid purpose in itself. The District Court in the Northern District of Illinois, Judge Ed Robson, had almost this very same problem in the case of In Re Cement Concrete Block at 381 F.Supp, almost the identical problem, and he concluded that the expression of need to hear what these employees have said before the grand jury in order that they might be prepared to impeach their testimony is a valid basis for seeking the information given by such employees at the grand jury hearing. His opinion is also relevant in another respect that I will mention in just a minute.

Also, another thing to consider in doing this balancing is the validity or the pertinence of the reasons for maintaining secrecy of grand jury proceedings.

In Judge Barnes's opinion in the Ninth Circuit case of U. S. Industries v. The United States District Court for the Southern District of California, Judge Barnes, just as Judge Robson did in the case that I just mentioned, talked about five classic reasons for secrecy in grand jury proceedings. The first is to prevent escape of those whose indictment may be contemplated, which is not pertinent here.

The second is to ensure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning grand jurors. Of course the grand jury has long since been discharged and that isn't of pertinence anymore.

The third is to prevent subornation of perjury or tampering with a witness who may testify before the grand jury and who may later appear for trial. That isn't of any relevance anymore.

The fourth is to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes. That is pertinent.

The fifth is to protect an innocent accused who is exonerated of the fact that he is under investigation and the expense of standing trial. That isn't of pertinence anymore.

So the fourth is the only one that has pertinence, but the defendants in this case have all the information. As I understand it from the government, representatives of Douglas and Phillips did examine the transcripts of the testimony of their fellow employees or their employees, and it is only the testimony of those people that is sought in the first request, as I understand it. The petitioners seek the information with respect to the transcripts that

were made available to Douglas and Phillips, and also they seek the documents that were submitted by Douglas and Phillips. So, if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.

And when you get right down to it, this is a civil antitrust action. I don't know what those people said. I don't know whether their testimony would help Douglas or help the plaintiffs, but in matters of discovery it is best that both sides have the information available. That is what discovery is for. Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also.

All right, that is where the laboring oar lies, gentlemen. Do you want to pull it?

MR. THURSTON: Your Honor, perhaps two points. The first one goes perhaps more to the substance of the last comment that you made. There is a very recent case very recently reported — in fact reported after we had filed our brief — entitled the State of Texas v. United States Steel Corp., 546 F.2d 627. It is a Fifth Circuit case. In that case it was pointed out that a corporation obtaining grand jury transcripts of its own employees did not destroy the supposed grand jury secrecy. I think the rationale behind that case is that employees are not reluctant to have their own employers see what it is that they have testified to. The grand jury secrecy can be maintained within the company, within the family, so to speak. When the secrecy goes further, it is a different matter.

But with that sort of a sideline comment, I suppose, the main thrust of my comments would be that while we do not dispute that your Honor has jurisdiction over the petition here, we question whether that jurisdiction needs to be exercised at the present time or whether the question

is really ripe. These petitioners have a civil case going in the State of Arizona. They have asked for discovery of these materials in that Arizona case. The defendants have, as you pointed out, all of the grand jury transcripts and all of the documents in their possession. It seems to me that the Arizona court does have both jurisdiction and probably a better feel for whether or not the traditional discovery methods are appropriate here and whether or not these materials should be discovered through those methods.

THE COURT: Who is the judge in Arizona?

MR. THURSTON: Judge Walsh and Judge Frey.

THE COURT: I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here.

Anyway, how would Judge Walsh or Judge Frey have any objection to the avoidance of a discovery scrap before them? If on some other proper basis the petitioners can get the information, why would they care?

MR. THURSTON: Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to

make that decision. It would seem to me, having made that decision, if there was yet a question as to whether the transcripts could be turned over, at that time perhaps it is ripe and appropriate for this Court to make that decision; but the initial relevancy decision, it would seem to me, would go both to the propriety of the initial discovery and to the question of particularized need. If those judges determine they are not relevant, it seems to me that the particularized need is very difficult to show here.

THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?

MR. THURSTON: Your Honor, I think that one of the reasons for grand jury secrecy, and it is perhaps embodied in the ones that you mentioned, is that these proceedings are not just to be spread over to the public —

THE COURT: That is right.

MR. THURSTON: — to look at possible violations that have no particular relevance to anything. It is possible that there were — not possible. It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, whereas the proceedings in Arizona may not involve such a broad territory. It just seems, if the relevancy is first established in Arizona, then we've got a good reason to come here to this court, but if that —

THE COURT: I am not going to deny the motion. If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern.

As far as relevance, I would think that there is a prima facie relevance because of the nature of the grand jury inquiry with relation to the proceedings here concerned.

MR. THURSTON: It is true, your Honor, that the grand jury inquired as to antitrust violations, but, of course, there is a very wide range of possibilities there.

THE COURT: Yes. Would you educate the Court as to why you think this information may be relevant, gentlemen. Anybody from your side.

MR. BERMAN: Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers.

THE COURT: You filed your complaint on the basis that there was a nolo contendere plea on the prosecution here?

MR. BERMAN: We filed our complaint first before the indictment, your Honor, but the indictments — and I have the paragraph citations — are absolutely parallel to the charging paragraphs of the indictment, and that I think establishes the relevancy.

THE COURT: If it was relevant to the grand jury inquiry, it would ipso facto be relevant to your case as far as you are concerned?

MR. BERMAN: That is correct, your Honor.

THE COURT: All right.

MR. BLISS: Your Honor, if I may speak to the relevancy question. Harold Bliss. The plaintiffs' complaints were filed well over a year before the grand jury indictment.

THE COURT: A year before?

MR. BLISS: Yes, your Honor. The Gas-A-Tron case involves only retail sales in Arizona. The plaintiffs in Arizona are engaged in the retail gasoline business, principally in Tucson, Arizona. None of the — well, the only supplier that the plaintiff had was Eugene Lewis, Lewis Arizona Oil Co., and Mr. Lewis' supplier was Shell Oil Company. Now, Shell Oil Company was not indicted and Shell Oil was not named as an unindicted co-conspirator, nor was Lewis Oil Co. So, if Phillips and Douglas had conspired to fix the wholesale price, it wouldn't have any effect on the plaintiffs because they didn't receive their supply from either the indicted companies or the alleged co-conspirators.

In the Petrol Stops complaint, there are thirty-one different types of Sherman Act violations alleged. Since that suit was filed the deposition has been taken by the defendants of Mr. Robert Borgert, who is one of the partners and the chief operating officer of Petrol Stops, and through that deposition we have been able to narrow down the scope of that lawsuit. Essentially what he is talking about, and I have cited the pages in my brief and I have attached copies of the deposition pages, he is talking about attempts to control his business at the retail level to get him to engage in retail price fixing. He says this was done by solicitations to have them join; by comments made by one or more of his suppliers that he has to get his prices in line or he is going to lose supply; and by predatory pricing by the defendants in that they would bring in subsidy, drive the price down

below his buying price and attempt to put him out of business. Not once in there did he say that he is complaining about wholesale price fixing. We have fourteen pages in over 2200 pages of testimony, and nowhere in there does he make the complaint that he is talking about a wholesale price fixing case. He is talking about activities at the retail level.

For that reason we are saying that the grand jury indictment, the transcripts and the documents are not relevant to his lawsuit and that this determination should be made by the Arizona court initially. For one reason, there are other defendants and there has been subsequent request to produce documents going to these type of documents and transcripts that are addressed in the Arizona cases that presumably will be decided by Judge Frey or Judge Walsh in the Rule 37 proceeding, which is the way I think this should be handled now rather than over here.

THE COURT: All right, thank you.

MR. BLISS: That is all I have to say about relevance at the moment.

THE COURT: All right. I am not going to make any orders upon the defendants. I am not going, in effect, to issue upon the defendants a demand to produce. If the plaintiff wants to get the defendants to produce anything, that can be done through that litigation. But the petitioners have asked for access to certain grand jury records, and that request will be granted with respect to the first request. That is the one where you asked for access to the same information that was accorded the defendants and the documents that they produced.

Have I correctly articulated your request?

MR. BERMAN: That is correct, your Honor.

THE COURT: And the Government so understands it?

MR. HERNACKI: Yes, your Honor.

THE COURT: All right, that access will be made.

What is your name, sir?

MR. HERNACKI: Hernacki.

THE COURT: Mr. Hernacki, you said the best way to do it would be to have the defendants make the papers that they got from the grand jury available. I am not going to do it that way. You make arrangements with the petitioners to have access to that information. If Phillips and Douglas want to cooperate in the mechanics of reproduction that is all right, but my order is simply that the grand jury records will be opened up to that limited extent. Do you understand, sir?

MR. HERNACKI: In other words, your Honor, we are to make the documents available; however, if Phillips and Douglas wish themselves to produce a set of documents —

THE COURT: That is up to them.

MR. HERNACKI: — that is up to them.

THE COURT: That is a matter among you.

MR. HERNACKI: Yes.

THE COURT: My order is simply that the custodians of the grand jury records will make them available to that extent to the petitioners. That is with respect to the first request.

With respect to your second request, I am about to deny it. In the first place, as I think Phillips and the Government said, there are no points and authorities and there is no need shown with respect to them. Also, some of this information that was before the grand jury may have come from or be relevant to competitors or something of that kind. I don't think there is any show-

ing that would justify your having any more than you asked for in the first request.

MR. PERRY: Excuse me, your Honor. The second request was not to be before the Court today. We made an agreement a month or so ago that we would not involve in this hearing any of the parties other than Phillips, Douglas and Continental.

THE COURT: I see.

MR. PARRY: That one was filed improperly. Hearing date would have to be set in the future after proper briefs and memorandums have been filed.

THE COURT: All right.

MR. PARRY: That was our mistake, your Honor.

THE COURT: If I am not asked to rule on that, I am not doing so. But now you understand who has the uphill battle on that one.

MR. BERMAN: Yes, your Honor.

THE COURT: Anything further, gentlemen?

MR. BLISS: Your honor, my initial comments were restricted solely to relevance. I would like to talk about the cases on the merits of disclosing the grand jury documents.

You referred to Judge Robson's decision in the Concrete Block case as far as impeachment is concerned. The plaintiffs have cited a number of other cases in which transcripts were made available to civil plaintiffs. In all of those cases, your Honor, a deposition was being taken and the deponent was evasive or couldn't remember anything.

In this case no deposition has even been noticed of any defendants. There hasn't been any opportunity for them to be shown to be vague or unresponsive or to fail to recollect what the testimony is, and there has been no

particularized showing of a compelling need. Until there is something of that nature, I believe the transcripts should remain secret, as they have been ruled in the State of Texas vs. U. S. Steel Corporation that Mr. Thurston referred to. I think that case disposes of the numerous district court cases that the petitioners have cited, saying that if the defendant has them under Rule 16 of the federal criminal rules that then there is no need for particularized showing of compelling need. I think that is the most recent authority out of the Fifth Circuit, and I think it is correct.

As far as the U. S. Industries case is concerned, that case involved a governmental pre-sentencing memorandum that had been shown to the defendants. The petitioners could not get that any other way but through the Government. Here we have the documents; we have the transcripts. We can make them available to them — that is, our copies — if the Court that has the civil antitrust case compels us to under Rule 37.

As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction.

THE COURT: All right.

MR. BLISS: The Herman Schwabe case dealt with the grand jury minutes and an attempt to get it in the wrong district court. That is not what we are talking about here.

THE COURT: It comes pretty close, doesn't it? The results of grand jury proceedings.

MR. BLISS: The minutes were in the possession of the court in Massachusetts, not in the District of Columbia.

THE COURT: Sure.

MR. BLISS: We are talking about our documents of which we have copies and transcripts of which we have copies.

MR. BLISS: In the Seventh Circuit case, that statement by the court was simply in the context of whether a court should interfere with an ongoing grand jury. It says it is under the control of the Court, not a —

THE COURT: I have read your authorities, Mr. Bliss. I am still of the same mind.

There is one thing, gentlemen. That information will be given to you under a protective order, however. You are not to disclose it. You are to use it only for purposes of this litigation. Is there any reason why it needs to be disclosed to anybody other than you or your lawyer colleagues?

MR. BERMAN: No, your Honor. If the order can be that it only be disclosed to counsel for the petitioners to be used solely for the purposes of the litigation and applicable proceedings in that litigation, that is fine.

THE COURT: Prepare an appropriate order and include that protective order.

MR. THURSTON: Your Honor, a suggestion of perhaps one further protection. In previous proceedings of this nature it has been stipulated that when these grand jury transcripts go out they are to go back to the Government at the conclusion of the proceedings. Can we incorporate that?

THE COURT: Yes, I think we can incorporate that, too. Any objection to that?

MR. BERMAN: None at all, your Honor.

THE COURT: All right. That will be included.

Will you prepare an appropriate order?

MR. BERMAN: We will, your Honor.

THE COURT: All right, gentlemen. Thank you.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent,* DOUGLAS OIL COMPANY OF CALIFORNIA, et al., *Real Parties In Interest.*	Miscellaneous No. 5706

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 19 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, March 28, 1977, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, 1977.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY,
Intervening-Respondents.

PETITIONERS' REPLY MEMORANDUM IN RESPONSE TO PHILLIPS PETROLEUM COMPANY'S AND DOUGLAS OIL COMPANY'S OPPOSITION TO THE PETITION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA
Misc. No. 5706

Petitioners seek from this Court an Order granting them the right to inspect transcripts of grand jury testimony and documents produced pursuant to grand jury subpoena which have been impounded by Order of this Court. The respondents,* Phillips Petroleum Company and Douglas Oil Company, styling themselves "the real parties in interest", have opposed the Petition primarily on the ground that respondents believe that this Court is not competent to determine the relevancy of the grand jury material requested to the issues in the lawsuits now pending in the United States District Court for the District of Arizona, *Petrol Stops v. Continental,* Civil No. 73-212 TUC-JAW, and *Gas-A-Tron and Coinoco v. Union Oil Company,* Civil No. 73-191 TUC-WCF. (Hereinafter collectively referred to as the "private Arizona actions".) Continental Oil Company has not opposed the Petition; it correctly understands that it does not have standing. As the United States District Court for the District of Illinois explained in *Connecticut v. General Motors Corp.,* 1974-2 Trade Cas. ¶ 75,138 (N.D. Ill. 1974):

> The only person or entity empowered to assert a right to the continued secrecy of Grand Jury transcripts is the government, or more precisely the United States Attorney as an agent of government, through and by whom the Grand Jury testimony was obtained. The defendants who have obtained disclosure and copies of Grand Jury testimony in another proceeding by the showing of a particularized need, do not thereby acquire any vested interest in the documents, the testimony or the secrecy previously attached thereto. Having obtained a waiver of Grand Jury secrecy for their own purposes in another matter, they cannot presume to assert secrecy as a bar to disclosure in this case. The suggestion in the brief of Ford and General Motors that

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* Although not formally correct, for the sake of clarity, Phillips Petroleum Company and Douglas Oil Company will hereinafter be referred to as "Respondents".

the disgorging by them of Grand Jury transcripts is somehow a deprivation of or encroachment upon the constitutional rights of these two corporations, is to assume a right to the continued secrecy of the testimony of certain individuals before the Grand Jury which no longer exists, and which never in any event inured to the benefit of the corporate defendants, and therefore may not be asserted by them. (*Id.* at 97,081.)

Phillips and Douglas are not the "real parties in interest". Their only interest is in impeding discovery. They have no "right" to assert. Only the United States Attorney is empowered to assert the right, and the United States Attorney in this case has not asserted any right to secrecy. In fact, as evidenced by the letter from the United States Department of Justice, Antitrust Division, to attorneys for respondents, the Justice Department makes no objection to the Petition and will not oppose it. (See, Exhibit A attached hereto.)

Phillips and Douglas do not advance legally sufficient grounds for the continued "secrecy" of transcripts and documents which already have been shown to them but, in fact, Phillips and Douglas merely make a self-serving collateral argument that this Court somehow is not the proper forum to determine whether the transcripts and documents involved in a grand jury proceeding of this Court ought to be disclosed for the inspection of treble damage plaintiffs. Simply, Phillips and Douglas make the following collateral arguments:

1. That jurisdiction is properly in the United States District Court for the District of Arizona. (*See*, Phillips' Memorandum at 16; Douglas' Memorandum at 4-7.)

2. That this Court cannot properly determine the scope of discovery in an antitrust case. (*See*, Phillips' Memorandum at 17; Douglas' Memorandum at 4.)

3. That the petition is premature and should wait the conclusion of all other methods of discovery. (*See*, Phillips' Memorandum at 16; Douglas' Memorandum at 2.)

Phillips and Douglas then conclude that:

4. Petitioners do not meet the standard of disclosure.

I. Only The District Court Where The Grand Jury Proceedings Took Place Has Jurisdiction Over The Grand Jury Transcripts And Documents.

The facts are undisputed. Early in 1973, respondents were served with a Subpoena Duces Tecum issued by the Clerk of this Court to appear before a grand jury and produce certain documents. The respondents and numerous other rebrand wholesalers of refined petroleum products responded and produced certain documents and employees and agents to testify before a grand jury of this Court. On or about March 19, 1975, the grand jury issued its indictment against respondents in Criminal Action No. 75-377, again to this Court. On the same day the Justice Department of the United States Government filed a civil action against the same respondents, Civil No. 75-974-HP, again in the United States District Court for the Central District of California. On December 3, 1975, this Court accepted *nolo contendere* pleas from the respondents, Phillips Petroleum Company and Douglas Oil Company, and on or about February 1, 1977, the Justice Department made public a proposed consent judgment to be entered in the civil action which was pending in this Court.

In the course of the criminal proceedings, this Court impounded all of the documents and transcripts of the grand jury proceedings. However, during the course of the criminal proceeding both Phillips and Douglas were permitted to examine the transcripts of their employees, agents and other individuals and were shown documents

exhibited to the grand jury. It is these records that petitioners now seek.

All relevant acts involving the grand jury proceedings and the documents and transcripts sought are within the jurisdiction of this Court. And, in fact, these documents and transcripts are subject only to an Order of this Court. The United States District Court for the District of Arizona obviously does not have jurisdiction over the documents being held by the Antitrust Division of the Justice Department in Los Angeles, and it is without power to order a sister district court to disclose grand jury documents.

But, more importantly, case law is clear, only the district court impaneling the grand jury has jurisdiction over the transcripts of its proceedings and over the documents subpoenaed by the grand jury. *Herman Schwabe Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1956). This same issue was discussed at length by the United States Court of Appeals for the Seventh Circuit in *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1957).* As that court concluded:

> We are aware that it has been held that, if, after an indictment has been founded and made public and the defendant has been apprehended, Metzler v. United States, 9 Cir., 64 F.2d 203, 206, and the grand jury discharged, Atwell v. United States, 4 Cir., 162 F. 97,

* In the report of this case it is indicated that certiorari was granted on February 25, 1957, and indeed the Supreme Court's order of that date, 77 S.Ct. 552, 352 U.S. 997, 1 L.Ed.2d 544, does purport to grant certiorari in that case. Study of the petition for certiorari and other original documents discloses, however, that it is not the order of Nov. 13, 1956, reported at 239 F.2d 263, which was involved in the petition for certiorari, but rather a criminal proceeding involving the same parties, decided by the Seventh Circuit June 15, 1955, and reported at 225 F.2d 394. Ultimately the Supreme Court vacated the June 15, 1955, judgment, 78 S.Ct. 245, 355 U.S. 233, 2 L.Ed.2d 234, but this did not affect the order of Nov. 13, 1956. (*Wright & Miller*, Criminal § 109, at 1965, fn. 76.)

> 101, a disclosure becomes essential to the attainment of justice and the vindication of the truth, the rule of secrecy may be relaxed in the discretion of the court. *This responsibility should reside in the court, of which the grand jury is a part and under the general instructions of which, it conducts its "judicial inquiry".* Schmidt v. United States, 6 Cir., 115 F.2d 394, 397. (Emphasis supplied.) (*In re April 1956 Term Grand Jury, supra* at 272.)

Jurisdiction over the grand jury transcripts and documents sought by petitioners in this action alone is in this Court. The United States District Court for the District of Arizona could not properly order disclosure of transcripts of the proceedings of a grand jury impaneled by this Court and of documents impounded by Order of this Court.

II. Discovery Envisioned By The Federal Rules Of Civil Procedure Is Limited Only By The Issues Of The Pleadings And Not By The Limitation Of The Testimony Given At A Single Deposition.

Respondents seek to limit petitioners' access to respondents' own documents and the testimony of their own employees by arguing for continued secrecy of the material developed by the now disbanded grand jury. Respondents cannot, in good faith, argue that the information sought by petitioners is not relevant to the issues in the pending private Arizona actions.

Rule 26(b) of the Federal Rules of Civil Procedure requires only that the information sought by discovery be "relevant to the subject matter involved in the pending action." As *Wright & Miller* states, "[T]his is an explicit recognition that the question of relevancy is to be more loosely construed at the discovery stage than at the trial." (*Wright & Miller*, Civil § 2008, at 41.) The United States Supreme Court in the leading case of

Hickman v. Taylor, 239 U.S. 495 (1947), explained that "the deposition — discovery rules are to be accorded a broad and liberal treatment", and as Justice Jackson reiterated in his concurring opinion, "it seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in this case." (*Id.* at 516.)

The limitations of Rule 26 to material relevant to the subject matters involved in the pending action is not restricted to precise issues presented by the pleadings. *T.W.A. v. Hughes,* 29 F.R.D. 523 (S.D.N.Y. 1961); *Hercules Powder Co. v. Rohm & Hess Co.,* 3 F.R.D. 302 (D. Del. 1943); *Burrows v. Warner Bros. Pict. Inc.,* 12 F.R.D. 491 (D. Mass. 1952); *Stephen Theatre Corp. v. Lovell's,* 17 F.R.D. 494 (E.D.N.Y. 1955). In *Stevenson v. Melady,* 1 F.R.D. 329 (D.C.N.Y. 1940), Judge Leibell stated,

> To limit an examination to matters relevant to only the precise issues presented by the pleadings would not only be contrary to the express purpose of Rule 26 . . ., but also might result in a complete failure to afford plaintiff an adequate opportunity to obtain information that would be useful at trial. (*Id.* at 330.)

The United States Supreme Court recognized this same principle in *Hickman v. Taylor, supra,* when it explained that the purpose of the discovery rules are to determine and define the issues to be tried. (Supra at 500-01.)

Phillips in its memorandum argues that the scope of discovery under Rule 26(b) is not even as broad as the issues in the Complaint, but must be limited by depositional testimony.

The offenses for which respondents were indicted and to which they plead *nolo contendere,* are precisely the same antitrust violations, among others, described in petitioners' Complaints in the private Arizona actions. Paragraph 16 N of the Complaint in *Petrol Stops v.*

Continental claims that the respondents, Phillips and Douglas, together with other named defendants and their co-conspirators,

> . . . combined and conspired to fix, raise and maintain the price of gasoline charged to independent marketers of gasoline, including the plaintiff.

Paragraph 15 L of the Complaint in *Gas-A-Tron v. Union* alleges the same violative conduct by the respondent, Phillips, and others in Tucson, Arizona. This same violative conduct by these same defendants in the same geographic area, during the same time period was the subject of the Indictment of the grand jury against Phillips and Douglas and their co-conspirators.

It is clear from the "Definitions" section, paragraph 1 of the Indictment that rebrand gasoline as used in the Indictment is identical to the gasoline sold petitioners and other independent marketers alleged in paragraphs 16 N and 15 L of the private Arizona actions. "Rebrand gasoline" as used in the Indictment is gasoline sold to independent unbranded marketers. Petrol Stops, Gas-A-Tron and Coinoco are the marketers of the "rebrand gasoline" whose purchase price the Indictment claimed had been fixed in violation of Section 1 of the Sherman Act by Douglas, Phillips and others. As the Indictment explains in paragraph 12, Phillips, Douglas and their co-conspirators had combined and conspired to "increase, fix, stabilize and maintain the price of rebrand gasoline."

The language of the Indictment in a criminal context and of the Complaints in a civil context are almost identical. The testimony and documents upon which the Indictment was based are clearly within the scope of discovery of the private Arizona actions.

III. Petitioners' Petition To This Court For Disclosure Of Grand Jury Transcripts And The Federal Rules of Civil Procedure Do Not Prohibit A Party From Seeking Discovery By One Method As Opposed To A Method Suggested By The Opposing Party.

Proper discovery compels petitioners to seek disclosure of the grand jury transcripts. Respondent, Phillips, in its memorandum suggests that "it is premature to consider the instant petition" because the grand jury transcripts and grand jury documents can be obtained by the petitioners in the private Arizona actions. (Phillips' Memorandum at 16.) This is precisely what the plaintiffs in the private Arizona actions are seeking in their Petition to this Court.

Douglas similarly argues that petitioners have not exhaustively sought the documents in the private Arizona actions. Petrol Stops propounded a Request for Documents under Rule 34, Douglas objected to the request and did not produce the grand jury materials. Douglas argues that petitioners should have filed a motion to compel pursuant to Rule 37 after complying with local rules requiring counsel to meet to attempt to resolve differences. Counsel for petitioners has met with counsel for five of the defendants and has meetings scheduled this week with counsel for Douglas and Continental. Petitioners seek the grand jury documents and grand jury transcripts which respondents have to date refused to produce in the private Arizona actions. As Judge McGarr explained in *Connecticut v. General Motors Corp.*, 1974-2 Trade Cas. ¶ 75,138 (N.D. Ill. 1974).

> . . . this matter should be considered in the context of traditional discovery principles. The Grand Jury transcripts involved are being regarded by this Court as statements of potential witnesses in the hands of the defendants. The fact that they were taken under oath before a Grand Jury is no longer relevant to the consideration of this motion, once the concept of the Grand Jury secrecy has been removed from consideration by delivery and disclosure to the defendants, albeit in another lawsuit and for other purposes. (*Id.* at 97,080-81.)

In *U.S. v. Saks & Co.*, 1976-1 Trade Cas. ¶ 60,741 (S.D.N.Y. 1976), Judge Worker discussed the importance of making grand jury developed information available to plaintiffs rather than requiring a repetitious pursuit of the information through civil discovery methods. He explained:

> In my opinion, in the interests of justice and judicial as well as administrative economy, the disclosure of documentary evidence by this method [motion for examination and copying of documents and statements voluntarily or involuntarily produced for the Department of Justice] is superior to proceeding by way of the Federal Rules. I further believe that the time of discovery will be shortened by this method. (*Id.* at 68,182.)

IV. Petitioners Are Entitled to Inspect The Grand Jury Transcripts And No "Particularized Need" Need Be Shown.

The continued secrecy of grand jury transcripts and documents is not absolute. As the United States Supreme Court recognized in *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150, 233 (1940), "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." (*Id.* at 233.) As Justice Brennan noted in his dissent in *Pittsburg Plate Glass Co. v. U.S.*, 360 U.S. 395, 403 (1959):

> Grand Jury secrecy is, of course, not an end in itself. Grand Jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or

when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice. (*Id.* at 403.)

Courts, in similar cases, consistently have ordered the disclosure of grand jury transcripts and documents to third-party treble damage plaintiffs. In *In re Sugar Antitrust Litigation*, 1976-1 Trade Cas. ¶ 60,934 (N.D. Cal. 1976), the United States District Court for the Northern District of California explained:

> Because the defendant C and H had the opportunity to inspect and analyze the transcripts during the course of the prior government proceeding, the policy reasons supporting the rule of grand jury secrecy have been vitiated by the prior disclosure. These grand jury transcripts are relevant to the pending treble damage actions and no further showing of particularized need is required to permit disclosure of these transcripts to plaintiffs. *It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to these transcripts.* (Emphasis supplied.) (*Id.* at 69,080.)

The facts in *In re Sugar* were almost identical to the facts before this Court. During the course of the criminal proceedings arising from the indictment of C and H Sugar, the Antitrust Division was ordered to produce to the defendant, C and H, the transcripts of the testimony of its present and former officers and employees who testified before the grand jury. These criminal proceedings were terminated against all defendants by pleas of *nolo contendere*. The request for disclosure followed the complete termination of the criminal proceedings — the grand jury had completed its investigation, returned its indictments and had been dismissed.

Similarly, the United States District Court for the District of Arizona in *In re Arizona Dairy Products Litigation*, 1976-1 Trade Cas. ¶ 60,910 (D. Ariz. 1975), as affirmed by the Ninth Circuit; and the United States District Court for the Eastern District of Michigan in *In re Toilet Seat Antitrust Litigation*, 1975-2 Trade Cas. ¶ 60,557 (E.D. Mich. 1975); and the United States District Court for the District of Idaho in *Boise City, Idaho v. Monroe, Inc.*, 1976-2 Trade Cas. ¶ 61,178 (D. Idaho 1976); and the United States District Court for the Northern District of Illinois in *In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108 (N.D. Ill. 1974), all have reached the identical conclusion on facts essentially identical with the facts in this case and in *In re Sugar, supra*, as set forth above.

A. *The transcripts and documents, the subject of the present Petition, have been disclosed to respondents and the need to further maintain secrecy is not present.* Maintaining the secrecy of grand jury transcripts and documents cannot be treated in a vacuum. It can only be considered in light of the need to maintain the "secrecy" and in the need for disclosure. *U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18 (9th Cir. 1965), *cert. denied*, 382 U.S. 814 (1965).

> . . . in making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy consideration for grand jury secrecy as they apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need. (*Id.* at 21.)

It is clear in this case that there is no need to maintain secrecy.

Policy considerations supporting "continuation" of the grand jury secrecy in a particular case as set down in *U.S. v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D. Md. 1931), have been universally adhered to. *See, e.g., U.S. v. Procter & Gamble*, 356 U.S. 677, 681, n. 6, (1958); *U.S. Industries Inc. v. United States District Court for the Southern District of California, Central Division*, 345 F.2d 18 (9th Cir. 1965); *U.S. v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954); *In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974). These reasons are:

(1) To prevent the escape of those whose indictment may be contemplated;

(2) To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;

(4) To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;

(5) To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

See, U.S. Industries Inc. v. United States District Court for the Southern District of California, Central Division, 345 F.2d 18 (9th Cir. 1965).

In applying these policy considerations for maintaining secrecy to the facts of the present case, it is apparent the first three reasons are not applicable. All testimony before the grand jury has been concluded, and all indictments have been handed down and there can be no fear that any proceeding before the grand jury will be frustrated or that the guilty party escape the jurisdiction of the court. The grand jury has completed its investigation, returned its indictments and the criminal proceedings have been terminated by the return and acceptance of *nolo contendere* pleas of all of the defendants. Under these facts, "the rule of secrecy may be relaxed in the discretion of the court." (*See, In re the April 1956 Term Grand Jury*, 239 F.2d 263, (7th Cir. 1956).) *See also, In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108 (N.D. Ill. 1974); *U.S. v. Scott Paper Company*, 245 F. Supp. 759 (W.D. Mich. 1966); *Boise City, Idaho v. Monroc, Inc.*, 1976-2 Trade Cas. ¶ 61,178 (D. Idaho 1976).

The fifth policy reason also is no longer relevant because indictments were returned against all of the respondents. (*See, e.g., U.S. Industries v. United States District Court for the Southern District of California, Central Division*, 345 F.2d 18 (9th Cir. 1965).)

This leaves the fourth consideration as the only possible basis for maintaining traditional grand jury secrecy — that of insuring untrammeled disclosure by future grand jury witnesses. This factor, however, has been vitiated because the respondents have previously inspected the grand jury transcripts and documents during the course of the prior criminal proceedings. Those whom the grand jury witnesses most had to fear, their employers, have already inspected their testimony. Any danger of recrimination would have been affected by the initial disclosure and could not be increased by subsequent disclosure of the same material. (*In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. at 1108

(N.D. Ill. 1974).) Disclosure to petitioners in this action would not inhibit free and untrammeled disclosure, as the witnesses have nothing to fear from private treble damage plaintiffs whose only interest also is "to encourage free and untrammeled disclosure by persons who have information with respect to the commission of" violations of the antitrust laws. *See, U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18, 22 (9th Cir. 1965).

Controlling is the case of *U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18 (9th Cir. 1965), a case arising out of a petition by U.S. Industries to have the United States District Court for the Southern District of California order disclosure of government memoranda which contained testimony from witnesses which appeared before the grand jury and documents produced pursuant to grand jury subpoena for the use of U.S. Industries in a pending civil antitrust action. The facts in *U.S. Industries* are strikingly similar to the facts of the present petition. Prior to the filing of the petition for disclosure, the grand jury proceeding had been terminated, indictments had been entered and pleas of *nolo contendere* were permitted by the court over objection of the government.

On appeal the Ninth Circuit Court of Appeals held that disclosure was proper. The court noted that, "the secrecy that surrounds the grand jury is not absolute in nature." (*Id.* at 21.) The court noted that Rule 6(e) of the Federal Rules of Criminal Procedure provides that disclosure of matters occurring before the grand jury may be disclosed upon order of the court. The Circuit Court found that where the party opposing disclosure had already reviewed the material sought and the grand jury had completed its proceedings, the policy reasons for the maintenance of secrecy no longer existed. (*Ibid.*) In fact, the court found

that the policy reasons for maintaining the secrecy of the grand jury were overcome by the requirements of "liberal discovery procedure" in antitrust cases. *U.S. Industries, supra* at 23. *See also, Olympic Refinery Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1964).

The reasons for maintaining whatever secrecy there remains in the grand jury transcripts and documents no longer exist. Respondents Phillips and Douglas have destroyed that secrecy. The ends of justice now require that the plaintiffs in a civil antitrust action have access to the same material available to the defendants. No further particularized need is required. The ends of justice require that adverse parties have equal access to these transcripts.

B. *Even though the ends of justice require disclosure, petitioners have shown a "particularized need".* Respondents, Phillips and Douglas, in their briefs argue that no particularized need for disclosure has been shown which will overcome the policy reasons for secrecy. The cases consistently hold:

> The defendants in the criminal action have had the opportunity to inspect and analyze the transcripts, and therefore the policy reasons supporting the rule of grand jury secrecy have been vitiated by that prior disclosure. No further showing of particularized need is required to permit disclosure of the transcript to plaintiffs. It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to the transcripts. (*In re Toilet Seat Antitrust Litigation*, 1975-2 Trade Cas. ¶ 60,557, at 67,445 (E.D. Mich. 1975).)

See also, U.S. Industries Inc. v. United States District Court for the Southern District of California, 345 F.2d 18 (9th Cir. 1965); *In re Sugar Antitrust Litigation*, 1976-1 Trade Cas. ¶ 60,934 (N.D. Cal. 1976); and *In re*

Arizona Dairy Products Litigation, 1976-1 Trade Cas. ¶ 60,910 (D. Ariz. 1975).

On the facts of this case, even assuming that the respondent Phillips has a right to assert in view of the governments' decision that the maintenance of this secrecy is not necessary, and in light of the prior disclosure of this material to the very individuals opposing full and fair disclosure to the plaintiffs, particularized need has been shown and is legally sufficient. However, further sufficient need can be shown.

Petitioners have been involved in this complex protracted litigation for almost four years.* The recollection of some of the witnesses may be fading with time. The grand jury investigation occurred in June 1973. As the court said in *Sellers v. Allis-Chalmers Mfg. Co.*, 1963 Trade Cas. ¶ 70,730 (N.D. Ill. 1962):

> The need of the moving parties for access to the Grand Jury testimony for purposes of refreshing the witness's [sic] recollection or exposing inaccuracies in his deposition testimony is therefore as great now as it might be at trial. (*Id.* at 77,895.)

See also, Herman Schwabe v. United Shoe Machinery Corp., 194 F. Supp. 763 (D.C. Minn. 1958). The court in *In re Special 1952 Grand Jury*, 22 F.R.D. 102 (E.D. Pa. 1958), noted that it recognized that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings.

The Ninth Circuit Court explained in *U.S. Industries* that under similar circumstances a "particularized need" sufficient to overcome any policy reason for maintaining the disclosure of grand jury evidence in that case was made by showing that disclosure would aid discovery.

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* Discovery was stayed for over two years while Shell and Exxon unsuccessfully tried to disqualify plaintiffs' counsel.

(*Supra* at 23.) Consistent with the Ninth Circuit the Northern District of California found that the particularized need had been satisfied in *In re Sugar Antitrust Litigation, supra*, where the grand jury transcripts are relevant to the pending treble damage actions. (1976-1 Trade Cas. at 69,080.)

But, in this case there is even a further need. Rule 26(e) of the Federal Rules of Civil Procedure explains that a party responding to discovery is under a duty seasonably to amend a prior response as he obtains information upon the basis of which he knows that the response was correct or is no longer true. In responding to plaintiffs' first sets of interrogatories in the private Arizona actions, both Phillips and Douglas stated that they were not aware or had not engaged in any of the conduct which was the basis for the grand jury Indictment and which was the basis for their *nolo contendere* pleas in criminal actions. Petitions asked the following interrogatories:

> *Interrogatory No. 82.* State whether your company had any conversation or communication with any major oil company other than your company with regard to rack or spot prices on the sale of gasoline in the United States and, if your answer is in the affirmative, identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and specify each such conversation or communication.

In response, Douglas Oil Company replied:

> Douglas Oil Company is not aware of any such conversations or communications except discussions in the normal course of trade with its commercial customer, Armour Oil Company, as regarded the spot prices charged to it by Defendant.

Interrogatory No. 77. State whether your company had any conversation or communication with any major oil company other than your company relating to gasoline prices or gasoline market conditions in any of the areas listed in interrogatory number 40, or in the West Coast states and, if your answer is in the affirmative, identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and specify each such conversation or communication.

In response, Douglas Oil Company replied:

Douglas Oil Company is not aware of any communications or conversations since early 1969 with any major oil company relating to gasoline prices or gasoline market conditions in the West Coast states, including any areas which may possibly be contemplated in Interrogatory No. 40.

Defendant has, of course, held discussions with Armour Oil Company, on many occasions, regarding Armour Oil Company's buying price. These discussions were nothing more than normal supplier-customer communications.

Prior to the decision in *U.S. v. Container Corporation*, 89 S. Ct. 510, in January, 1969, inquiries may have been made from time to time of competitors to verify the report of field personnel as to a change of price by the competitor. There would, however, be no documents at this date disclosing any such communication.

Phillips response was a bit more circuitous. Phillips objected to the interrogatories on the following grounds:

Interrogatories 77 and 82 seek information concerning any conversations or communications with any major oil companies relating to gasoline prices or gasoline market conditions in a specified geographical

area. Phillips employees may have had conversations with other defendants, in accordance with the practice upheld by the courts in several decisions such as *Bellis-ton v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. den.* 408 U.S. 928; *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 205 (N.D. Cal. 1971); *Webster v. Sinclair Refining Company*, 338 F. Supp. 248 (D. Ala. 1971), to verify whether Phillips was justified under the law in lowering its price to its jobbers and dealers to meet competitive situation. It would be virtually impossible for Phillips to identify and verify the existence of any such conversations as requested in these interrogatories. Moreover, Phillips objects to these interrogatories to the extent they inquire about any such legal conversations were held, and documents related thereto, on the ground that such conversations, if any, are irrelevant and immaterial to plaintiff's claims and not reasonably calculated to lead to the discovery of admissible evidence. Since October 1969 it has been Phillips' policy to refrain from any conversations or communications with any and all of its competitors relating in any way to prices except in situations where Phillips is selling to or buying from a competitor and the price of the product being bought and sold obviously must be discussed.

Except for the two limited exceptions noted above, Phillips is not aware of any conversations or communications with any other defendant to this action with regard to gasoline prices.

The grand jury found that both Douglas and Phillips had been involved in these price fixing conversations and indicted them for just such a price fixing conspiracy. There was at least sufficient evidence before the grand jury to convince Douglas and Phillips to plead *nolo contendere* in a criminal action to conduct which was the subject of Interrogatory Nos. 82 and 77.

Either respondents did not have accurate information at the time of answering petitioners' interrogatories or they were hopeful that the information developed by the grand jury investigation would lead to the indictment and *nolo contendere* pleas would not become public. Whichever their motive, petitioners are entitled to present the facts surrounding the violations to the court in Arizona. Respondents were under a duty to supplement their answers:

> For a party to sit idly by, knowing that a previous answer he has given in response to discovery is no longer truthful in the light of his present information, is intolerable. It is inconsistent with the purpose of rules to avoid surprise and it is inconsistent with the standards of conduct that one expects in a learned and honorable profession. (*Wright & Miller,* Civil § 2048, at 320-21.)

If on the other hand Phillips and Douglas do not believe that their answers to interrogatories need supplementing, then petitioners certainly have a "need" for the material to impeach. The United States Supreme Court has found that such a need compels disclosure.

> We do not reach in this case problems concerning the use of the grand jury transcripts at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly. (*U.S. v. Proctor & Gamble*, 356 U.S. 677 (1958).)

Petitioners need the grand jury transcripts, notes and exhibits to determine the truth concerning the conversations regarding the price at which gasoline would be sold to respondents.

CONCLUSION

The petition to inspect and copy transcripts, notes and documents previously reviewed and inspected by Phillips Petroleum Company and Douglas Oil Company of California should be granted. It would be unjust and inequitable to allow a party to a civil antitrust action to view documents relevant to that action and to preclude an opposing party that same right. Petitioners merely seek to inspect and review all transcripts, notes and exhibits reviewed or produced by the defendants, Douglas Oil Company of California and Phillips Petroleum Company. Phillips, by claiming that it is a "Real Party in Interest" has attempted to argue that secrecy to documents exists which have already been disclosed to it and to Douglas. Douglas has argued that petitioners must pursue disclosure in a court that does not have jurisdiction over the grand jury material.

Phillips and Douglas, although pleading *nolo contendere* to criminal charges, answered interrogatories in the civil action claiming that the conduct supportive of the Indictment and *nolo contendere* pleas did not take place. Plaintiffs have a right to verify and impeach on the basis of the evidence known to Douglas and Phillips and exhibited to the grand jury.

DATED this 2nd day of March, 1977.

Respectfully submitted,

Douglas J. Parry
Gary F. Bendinger
BERMAN & GIAUQUE
500 Kearns Building
Salt Lake City, Utah 84101

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

Los Angeles Office
1444 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
213-688-2500

Please refer to:
60-57-220

December 15, 1976

John Dickey, Esquire
Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Max L. Gillam, Esquire
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071

Re: *United States v. Phillips Petroleum, Inc., et al.*

Dear Messrs. Dickey and Gillam:

Enclosed please find a Petition for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Pursuant to Grand Jury Subpoena, served on us December 15, 1976. You will note that the petitioners, plaintiffs in treble damage actions in Arizona, have requested an order to produce the grand jury documents and transcripts made available to Phillips and Douglas. The Antitrust Division will make no objection to this Petition; however, we wish to notify you of the Petition so that you may voice any objections you may have to the Court. We

Exhibit "A"

will notify you as soon as a date for hearing this Petition has been set.

If you have any questions, please feel free to contact me.

Sincerely yours,

(SIG)

Edwin D. Hausmann
Attorney
Los Angeles, Office

Enclosure

cc: Bruce R. Merrill
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of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, ET AL., *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent,* DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY, *Real Parties In Interest.*	Misc. No. 5706 RESPONSE OF DOUGLAS OIL COMPANY OF CALIFORNIA TO PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

Real party in interest Douglas Oil Company of California ("Douglas") hereby responds to the petition of Petrol Stops Northwest, et al. ("Petrol Stops") for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena.

I. PETROL STOPS' PETITION IS PREMATURE BECAUSE IT HAS NOT PURSUED ITS PREVIOUS REQUEST FOR THE SAME DOCUMENTS.

Petrol Stops already has sought to obtain copies of the very documents which are the subject of this petition. On or about October 5, 1976, in the case of *Petrol Stops Northwest vs. Continental Oil Co., et al.,* District of Arizona, No. Civ. 73-212 Tuc-JAW*, Petrol Stops propounded a Request for Production of Documents under Rule 34 from the defendants therein, Douglas, Continental Oil Company and Phillips Petroleum Company. That request sought the following:

> "1. All documents produced by you in the suit entitled United States vs. Phillips Petroleum Company, Douglas Oil Company, et al.
>
> 2. All documents in your possession and under your control subpoened by the Grand Jury in its indictment of Phillips Petroleum Company, Douglas Oil Company, et al. for fixing, stabilizing and maintaining the price of rebrand gasoline.
>
> • • • •
>
> 4. All documents of any depositions, grand jury transcripts, or any other testimony given by any individual in the United States vs. Phillips Petroleum Company, Douglas Oil Company, et al., lawsuit."

On or about January 17, 1977 Douglas responded to Petrol Stops' request for production of documents by objecting to such production on the grounds that the

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* Some of the plaintiffs in this case are also plaintiffs in other related District of Arizona cases. Douglas, however, is a defendant only in the case identified above.

materials produced before the grand jury were not relevant to the Arizona lawsuit nor were they likely to lead to the discovery of admissible evidence. Petrol Stops has not moved in the Arizona Court for an order compelling production of these documents pursuant to Rule 37 of the Federal Rules of Civil Procedure in the District Court of Arizona, which it is entitled to do if it believes that the requested documents are discoverable. Nor has Petrol Stops moved for any order compelling discovery so as to require the District Court of Arizona to rule on the permissible scope of discovery in the lawsuit before it.

Douglas has copies of all grand jury documents and transcripts sought by Petrol Stops in its petition. Douglas stands ready to produce those materials should the Arizona Court determine that production is required under Rule 34. Thus, it appears that Petrol Stops is attempting to circumvent and avoid a determination by the Arizona District Court of the crucial issue of whether the requested documents are relevant to its lawsuit. One can only conclude that Petrol Stops is fearful of the Arizona Court's greater familiarity with the question of materiality in the Arizona litigation.

II. THE ARIZONA DISTRICT COURT IS BETTER ABLE TO DECIDE THE ISSUE OF THE PERMISSIBLE SCOPE OF DISCOVERY.

A. The Scope of Discovery is a Crucial Issue in This Case.

The permissible scope of discovery is an important and hotly contested issue in this case, and although a substantial amount of discovery has been conducted in this lawsuit, a judicial ruling as to the permissible scope of discovery by Petrol Stops has not been made. Such a determination will be the product of extended argument on both sides. Petrol Stops seeks a broad relevancy ruling — the complaint, for example, purports to allege

31 antitrust violations within its 17 pages. The deposition of Petrol Stops' chief executive officer, however, appears to have limited the subject matter of the suit to (1) the alleged attempts by defendants and co-conspirators to involve Petrol Stops in the fixing of the retail price of gasoline; and (2) upon the failure of Petrol Stops to comply with that alleged scheme, the alleged attempts by defendants to restrict supply and engage in predatory pricing practices. Because knowledge of all developments in the suit and actions by the parties is necessary to a well advised decision on the permissible scope of discovery, the Arizona Court, which is familiar with such matters, is in a much better position to determine the issues in the case before it.

B. Petrol Stops is Attempting to Circumvent Its Own Agreement with Respect to the Determination of Relevancy.

In recognition of the likely and continuing dispute regarding the scope of discovery, Petrol Stops consented to defer a judicial determination of relevancy as to the production of documents. By agreement between Petrol Stops and all defendants, discovery is now being conducted in two waves. In the contemplated first wave, defendants would respond to Petrol Stops' request for documents. Petrol Stops would then review those documents produced by defendants and re-request those not supplied which Petrol Stops deemed necessary to the prosecution of its lawsuit. At that time, relevancy questions would be argued by the parties and a determination made by the Court. This discovery strategy was mutually agreed upon by Petrol Stops and all defendants in the Arizona cases at a meeting in Phoenix, Arizona on October 29, 1976. What Petrol Stops now apparently is attempting to do in its petition before the California Court is to avoid that agreement by seeking a relevancy de-

termination from this Court and by so doing preclude other defendants not named in this particular petition from arguing the proper scope of discovery. Moreover, Petrol Stops is attempting to gain for itself two opportunities of having the relevancy issue judicially decided to its advantage. Considerations of fairness and judicial economy suggest that Petrol Stops should have but "one bite of the apple" and thus only one court should determine the relevancy of plaintiff's request for these materials. The more appropriate court for this task is the District Court of Arizona.

C. Granting Petrol Stops' Petition Would Not Serve Principles of Judicial Economy.

By taking this petition before the Central District Court of California, Petrol Stops also apparently seeks to avoid the judicial economy safeguards codified in Local Rule 42A.2[b] of the Arizona District Court. That rule requires that:

> "No discovery motions may be heard unless a statement of moving counsel is attached thereto certifying that after personal consultation and sincere efforts to do so, counsel have been unable to satisfactorily resolve the matter."

The local rules of the Central District of California (Rule 3(1)) contemplate the same procedure. The purpose of both local rules is to insure that judicial time is not spent ruling on an issue until both parties have made sincere attempts to resolve the issue among themselves and find that they cannot. Petrol Stops previously has requested these grand jury materials from Douglas. Douglas has the materials and has objected to their request. Petrol Stops has not sought an order compelling production nor has it met with legal representatives of Douglas as required by Arizona Local Rule 42A.2[b]. Instead, Petrol

Stops seeks to have the California Court permit inspection of those documents without compliance with either of the local rules.

D. The California Court's Familiarity With the Grand Jury Proceedings Is Not Determinative.

Finally, Douglas anticipates that Petrol Stops will argue that the familiarity of the Arizona Court with the Arizona case is offset by the knowledge of the California Court regarding the materials and subject matter of the grand jury investigation. But that argument is largely illusory. The Arizona Court can more easily identify the subject matter of the grand jury inquiry than the California Court can identify the relevant scope of Petrol Stops' lawsuit. The documents which Douglas produced in the grand jury investigation appear on the subpoena issued by the grand jury. The subject matter of the investigation appears in the indictment. The Arizona Court need only look at that subpoena and indictment and measure the request for those materials against its determination of the subject matter of the private civil suit to pass on relevancy challenges. On the other hand, the California Court would be required to review the extensive record of this lawsuit, already familiar to the Arizona Court, in order to determine whether the request documents are discoverable.

The Arizona Court must in the exercise of its judicial functions determine the issues which it will try and the discovery to be conducted in the case before it. Whether the documents submitted by Douglas and the transcripts of testimony of Douglas employees before the grand jury are relevant to that discovery is subject to the Arizona Court's Local Rule 42A.2[b] and to a Rule 37 determination by that Court. To substitute this Court's decision on such points, which in the final analysis would not be binding on the Arizona Court, would be a needless act.

III. PLAINTIFF HAS FAILED TO SHOW SUFFICIENT PARTICULARIZED NEED TO OBTAIN THE GRAND JURY MATERIALS.

In order to obtain permission to inspect grand jury documents pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, plaintiff must show "particularized need." The controlling case of *U.S. v. Procter and Gamble Co.*, 356 U.S. 677, states that the historic policy of grand jury secrecy:

> "must not be broken except where there is a compelling necessity. There are instances where that need will outweigh the countervailing policy. But they must be shown with particularity." 356 U.S. at 682.

Not only has Petrol Stops failed to show any particularized need, it has failed to show any need whatsoever.

As mentioned above, Douglas has all the documents which Petrol Stops now seeks and Petrol Stops has sought the production thereof. Upon instruction by the Arizona Court pursuant to Rule 37 it will produce those documents. Thus, if it is decided that those documents are relevant to Petrol Stops' lawsuit, Petrol Stops will get them. Petrol Stops can demonstrate no need to obtain the documents through its petition to this Court.

The argument which Petrol Stops does advance to purportedly demonstrate its "particularized need" is wholly specious and rests on crucial factual inaccuracies. In an effort to make the requisite showing, Petrol Stops argues as follows: In February of 1974 (over a year before the indictment was returned), it propounded interrogatories in which defendants were asked to state whether they had had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Both Phillips and Douglas responded to the above interrogatory stating that they were unaware of any such conversations or communications. Petrol Stops then states that Phillips and Douglas were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from 1970 through 1971 and that both Phillips and Douglas "entered *guilty* pleas to the charges of conspiracy and price-fixing contained in the indictment." Therefore, concludes Petrol Stops, both Phillips and Douglas must have perjured themselves in their answer to Petrol Stops' first set of interrogatories and inspection of the documents, therefore, is required to procure the information and to prove the perjury (pp. 2, 3 of Plaintiff's Memorandum in Support of Petition).

However, as the records of this Court will show, Douglas has never pleaded guilty to such charges and the logic of Petrol Stops' syllogism is therefore faulty. Some time after all of the other indicted companies had pleaded nolo contendere, or "no contest", to the charges against them, Phillips and Douglas decided, with the Court's approval, to change their pleas to nolo contendere. This plea is not the equivalent of a plea of guilty.

Moreover, Petrol Stops' counsel knew that Phillips and Douglas did not enter guilty pleas before he filed this petition. Petrol Stops' counsel filed earlier a petition and memorandum in support thereof erroneously in the *Southern* District Court of California. The documents erroneously filed there contained the same materials and arguments contained in the petition now before the Central District Court. At the joint plaintiff and defense counsel meeting held on October 29, 1976 in Phoenix, Arizona, counsel for both Douglas Oil Company and Phillips Petroleum Company informed counsel for Petrol Stops that defendants had not pleaded guilty and that the matters set forth in the defectively filed petition were untrue. Nevertheless, Petrol Stops through its counsel filed the identical factually erroneous document with the Central District Court of California.

IV. CONCLUSION.

Petrol Stops' case for access to the grand jury material is based on an incorrect statement of fact. More importantly, however, Petrol Stops has failed to disclose to this Court the existence of its Rule 34 request in the Arizona Court. If there is compelling need for Petrol Stops to obtain the documents sought by this petition, the Arizona Court can order such discovery from the Arizona defendants. The petitioners have given no valid reasons for this Court to attempt to make the determination of need best reserved for the Arizona Courts.

Douglas, therefore, respectfully requests that the petition herein be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS, ET AL. *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	Misc. No. 5706 GOVERNMENT'S RESPONSE TO PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

The Government feels that petitioners have shown sufficient particularized need to be granted access to the grand jury transcripts and documents produced to Phillips Petroleum Company ("Phillips") and Douglas Oil Company of California ("Douglas") during the course of *United States v. Phillips Petroleum Company, et al.*, Cr. No. 75-337. The Government does not, therefore, oppose the Petition for Production for Inspection of

Transcripts of Grand Jury Testimony Produced Pursuant to Grand Jury Subpoena.

However, as to the documents, the Antitrust Division is acting as custodian of the documents which are the property of Phillips and Douglas. We therefore believe that Phillips and Douglas should be given an opportunity to be heard on this Petition to voice any objections they may have and have sent copies of the Petition to counsel for Phillips and for Douglas. We suggest that they be noticed and given an opportunity to be heard when a hearing on this Petition is held.

The Government would like to point out that representatives of Phillips and Douglas spent several weeks in Antitrust Division offices copying all of the requested documents onto microfiche. Phillips and Douglas also have copies of the grand jury transcripts of all witnesses who were their present or former employees. It is therefore respectfully suggested, if the Court determines that the Petition be granted, that the simplest and most convenient course would be for Phillips and Douglas to provide the microfiche directly to petitioners.

Dated: January 7, 1977

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA,
AND COINOCO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

No. Misc. 5706

I. INTRODUCTION

Petitioners, plaintiffs in *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 Tuc-JAW, and *Gas-A-Tron and Coinoco v. Union Oil Company, et al.*, Civil No. 73-191 Tuc-WCF, now pending in the United States District Court for the District of Arizona, are businesses headquartered in Tucson, Arizona, engaged in the retail distribution of gasoline in the states of Arizona, California, Oregon, Washington, Idaho, Minnesota, Missouri and Arkansas, through independent gasoline stations. Two of the defendants in these actions, Phillips Petroleum Company and Douglas Oil Company, were indicted by the federal grand jury in the United States District Court, Central District of California. The defendant Phillips Petroleum Company ("Phillips") is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined products, including gasoline, on a world-wide basis. The defendant Douglas Oil Company ("Douglas") is a wholly-owned subsidiary of the Continental Oil Company which markets ostensibly as an independent at the retail level. Douglas also supplies gasoline to retail distributors, including plaintiffs, through the Armour Oil Company.

Petitioner Petrol Stops Northwest, in December of 1973, filed a lawsuit in the United States District Court for the District of Arizona naming Phillips and Douglas, among others, as party defendants. The Complaint alleged violations of Sections 1 and 2 of the Sherman Act averring, in part, that defendants Phillips and Douglas had combined and conspired among themselves and with other named-defendants and co-conspirators to raise and fix the wholesale price of gasoline in certain western states.

Petitioners Gas-A-Tron of Arizona and Coinoco, in November of 1973, filed a lawsuit in the United States

District Court naming Phillips, among others, as party defendants. The Complaint alleged violations of Sections 1 and 2 of the Sherman Act averring, in part, that defendant Phillips had combined and conspired with other named-defendants and co-conspirators to raise and fix the wholesale price of gasoline in certain western states.

In February of 1974, plaintiffs propounded their first set of interrogatories to all defendants. Among the interrogatories propounded, defendants were asked to state whether their company at any time during the period commencing January 1, 1968, and ending December 14, 1974, had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the same western states. If the response to the above-interrogatory was in the affirmative, defendants were asked to identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and to specify each such conversation or communication. Phillips and Douglas responded to the above-interrogatory stating that it was unaware of any such conversations or communications. Accordingly, no documents were produced by these defendants relating to or concerning conversations or communications concerning prices at which independent or unbranded dealers sold or marketed gasoline in the western states and none were forthcoming. In particular, Phillips responded that:

> [s]ince October, 1969, it has been Phillips' policy to refrain from any conversations or communications with any and all of its competitors relating in any way to prices except in situations where Phillips is selling to or buying from a competitor and the price of the product being bought and sold obviously must be discussed.

On May 19, 1975, however, pursuant to the investigations of a grand jury impanelled in the Central District of California, Phillips and Douglas, among others, were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from mid-1970 through 1971. *United States v. Phillips, et al.*, No. 75-377. During the course of these criminal proceedings, both Phillips and Douglas were permitted to examine the grand jury transcripts of the testimonies of their employees. Consequently, Phillips and Douglas entered guilty pleas to the charges of conspiracy and price fixing contained in the indictment, and were duly fined for such violations. Criminal proceedings against these defendants now terminated, petitioners seek access to the above-mentioned transcripts.

II. THE GRAND JURY TRANSCRIPTS MADE AVAILABLE TO PHILLIPS AND DOUGLAS ARE NOT PROTECTED BY RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 6(e) of the Federal Rules of Criminal Procedure ordinarily protects proceedings of grand jury from disclosure. Once the actual transcripts of the proceedings have been made available for inspection by defendants in a criminal proceeding, however, those transcripts are no longer protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

In factual situations nearly identical to the present case, courts have consistently allowed civil plaintiffs access to grand jury transcripts. The Ninth Circuit in *U.S. Industries, Inc. v. United States District Court for the Southern District of California*, Central Division, 345 F.2d 18 (9th Cir. 1965), ruled that grand jury proceedings may be disclosed to civil litigants where the defendant was permitted to inspect portions of the proceedings.

In *U.S. Industries, Inc.*, defendants pleaded *nolo contendere* to an indictment for violation of Section 1 of the Sherman Act. Prior to the termination of the criminal proceedings, six civil suits were commenced against U.S. Industries, Inc. and others, for the same violations of the antitrust laws. During the course of the civil litigation, the private plaintiffs were given access to a memorandum prepared by the government which contained material within the purview of 6(e) of the Federal Rules of Criminal Proceedings. U.S. Industries, Inc. petitioned the court to reseal the memorandum. The issue presented to the court was whether the district court committed an abuse of discretion by permitting civil plaintiffs access to the government memorandum which had previously been sealed because of reference to grand jury proceedings.

The court in *U.S. Industries, Inc.* began its analysis of the issue by noting that the rule of secrecy surrounding the grand jury is not absolute in nature. (345 F.2d at 21.) The court then recognized that "in order to dispense with the secrecy a 'particularized and compelling need' must be demonstrated." (345 F.2d at 21.) The court stated that the trial judge has the initial discretion to determine whether such a "need" exists, and that where the reasons for maintaining secrecy "do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." (345 F.3d at 21.) The court stated that the reasons for secrecy are:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation

of perjury or tampering with the witnesses who may testify before the grand jury and who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The court found that the first three reasons and the fifth reason were irrelevant since the grand jury had completely terminated its proceedings against all defendants, and pleas has been entered by all defendants. The court found that since the parties opposing disclosure had an opportunity to inspect the memorandum, the fourth reason for secrecy was insignificant and a liberal discovery ruling was in order. Although the court did not say what "need" was demonstrated, its ruling permitting disclosure demonstrates that where the party opposing disclosure has been given access to the documents, the reasons for maintaining secrecy apply "to only an insignificant degree." The court did state, *in dicta*, that perjury, albeit of a grand jury witness, is a pressing need which would warrant disclosure.

Disclosure of grand jury transcripts for the purpose of impeachment and testing credibility was approved *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974). In *In re Cement-Concrete Block*, civil plaintiffs sought access to grand jury transcripts then in the possession of the Antitrust Division of the Department of Justice. The grand jury in that instance had returned indictments against members of the concrete block industry in the Chicago area for possible violations of the antitrust laws to which defendants entered *nolo contendere* pleas. During the course of the criminal proceedings some of the

defendants inspected the grand jury transcripts of their corporate personnel's testimony. Subsequently, private litigants brought antitrust charges against the same defendants and petitioned the court for access to the same transcripts examined by defendants.

In considering the petition, the court set forth the same five reasons for secrecy as set out in *U.S. Industries, Inc., supra*. The court noted that the first three reasons were no longer applicable, "in that the grand jury proceedings and all criminal proceedings arising therefrom have been completed." The court noted, in this regard, that the Supreme Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940), stated that "[g]rand jury testimony is ordinarily confidential. . . . but after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." The fifth reason was found no longer relevant "because indictments were returned against all the corporate respondents." (381 F. Supp. at 1110.) The court noted that the fourth policy reason had been "partially vitiated because the respondents previously inspected the grand jury transcripts of their employees during the course of the prior criminal proceedings," and further stated that the policy reasons of secrecy would be preserved by limiting disclosure to the attorneys of record in the civil case "for use in the litigation only for the purposes of impeachments, refreshing the witness' recollection and testing credibility." (381 F. Supp. at 1110.)

Most recently, the United States District Court, District of Arizona in *In re Arizona Dairy Products Litigation*, 1976-1 Trade Reg. Rep. ¶ 60,910 (D. Ariz. 1976), permitted disclosure of presentencing memoranda, prepared in part from grand jury material where the only need asserted was "expedition of plaintiff's pretrial discovery." In *In re Arizona Dairy Products*, defendant had entered pleas of *nolo contendere* to indictments alleging violation of the

antitrust laws. In subsequent civil litigation, private plaintiffs sought access to presentencing memoranda which had been disclosed to attorneys for individual defendants but not to counsel for corporate defendants. The court entered an order directing the Department of Justice to produce the memoranda. The order was stayed pending a petition for writ of mandamus or prohibition to the Ninth Circuit. The order to stay was vacated, however, when the Ninth Circuit dismissed the petition stating it was "unable to find that the [Arizona] district court abused its discretion [in ordering production of the memoranda]." *See also In re Sugar Antitrust Litigation,* 1976-1 Trade Reg. Rep. ¶ 60,934 (N.D. Cal., June 10, 1976), where the defendants in a civil antitrust action were ordered to produce to plaintiffs all grand jury transcripts previously produced to defendants. Judge Boldt stated that:

> [b]ecause defendant C and H had the opportunity to inspect and analyze the transcripts during the course of the prior government proceedings, the policy reasons supporting the rule of grand jury secrecy have been vitiated by that prior disclosure. These grand jury transcripts are relevant to the pending treble damage actions and no further showing of particularized need is required to permit disclosure of these transcripts to plaintiffs. It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to these transcripts.

In the instant case, Phillips and Douglas were indicted for the fixing of prices of rebrand gasoline in certain western states. During the course of the criminal proceedings, Phillips and Douglas examined grand jury transcripts of the testimonies of their employees. Subsequently, both defendants entered guilty pleas, and accordingly, criminal proceedings were terminated and have been terminated against all other parties indicted by the same grand jury. Petitioners, as plaintiffs in civil

actions alleging price fixing of rebrand gasoline in the same western states and during the same time frame for which defendants were indicted, are now clearly entitled to examine the grand jury transcripts made available to Phillips and Douglas to impeach their statements in answers to interrogatories and to expedite the discovery process.

III. THE PRODUCTION OF MATERIAL SUBPOENAED BY THE GRAND JURY WILL NOT INVADE THE SECRECY OF THE GRAND JURY.

Ordinarily, documents produced pursuant to a grand jury subpoena for use during its proceedings are protected by Rule 6(e), Federal Rules of Criminal Procedure, on the grounds that disclosure of such documents would be an "indirect" disclosure of matters occurring before the grand jury. However, when the reasons for protection of grand jury transcripts "do not apply at all in a given situation, or apply to only an insignificant degree," *U.S. Industries, Inc., supra* at 21, the documents produced pursuant to a grand jury subpoena, *a fortiori,* are entitled to no greater protection than the grand jury transcripts themselves — the transcripts manifestly constituting "matters occurring before the grand jury." Rule 6(e), Fed. R. Crim. P., whereas the document at best indirectly "occur" before the grand jury.

As amply demonstrated above, the reasons for preservation of secrecy "do not apply at all . . . or apply to only an insignificant degree" (*Id.*) in the instant isutation, *i.e.,* all criminal proceedings against all defendants have terminated, and defendants Phillips and Douglas were given access to grand jury transcripts of the testimonies of their employees.

Petitioners, Petrol Stops Northwest, Gas-A-Tron and Coinoco, have demonstrated a specific and compelling

need for an order directing the production of these documents in that defendants have perjured themselves in stating that they are unaware of any conversations or communications with regard to price of rebrand gasoline, when, in fact, defendants, subsequent to responding to petitioners' interrogatories, pleaded guilty to price fixing of rebrand gasoline in the areas and during the times complained of in petitioners' complaints. As stated in *U.S. Industries, Inc., supra* at 21, where the policy reasons of Rule 6(e) are partially or wholly vitiated, "the party seeking disclosure should not be required to demonstrate a large compelling need." Petitioners have demonstrated more than ample need since the denial of such conversations or communications relating to price of rebrand gasoline by Douglas and Phillips places the discovery process in an impasse situation.

Even in instances where the policy reasons for preservation of secrecy of grand jury proceedings are applicable, the trial judge may permit civil litigants to examine documents held under a federal grand jury subpoena duces tecum.

In *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the Second Circuit allowed the ICC to examine records held under a grand jury subpoena. The court noted that disclosure of documents produced pursuant to a grand jury subpoena were protected from disclosure by Rule 6(e), but stated that:

> It is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake — for its intrinsic value in the furtherance of a lawful investigation — rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents

> had been, or were presently being, examined by a grand jury. (*Id.* at 54.)

The court further stated that the ICC did not seek to learn what use the grand jury made of the records and that the ICC had independent authority to examine the records, thus removing them from the prohibition against disclosure of Rule 6(e). (*Id.* at 54.)

In the instant case petitioners are not specifically seeking those documents produced by Phillips and Douglas which were presented to the grand jury, but are seeking all documents produced by Phillips and Douglas which are relevant and material to the allegations of petitioners' complaints, and which should have been produced pursuant to interrogatories propounded to defendants. Petitioners thus are not seeking to learn, via the documents, what took place before the grand jury, but seeks such documents for their intrinsic value in the furtherance of petitioners' lawful investigation.

The court stated that the applicable test in this regard was whether independent legal authority for the inspection existed and whether the examination sought would be in violation of Rule 6(e). (*Id.*)

Although the ruling in *Interstate Dress Carriers, Inc.* involved a governmental agency, the court in *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 211 F. Supp. 729 (N.D. Ill. 1962), made it clear that this ruling applies to private civil litigants as well. In *Commonwealth Edison*, the above-cited passage from *Interstate Dress Carriers, Inc.* was cited with approval in upholding a pretrial order directing production by defendants of documents "produced by such defendant before any grand jury in the Eastern District of Pennsylvania in the course of investigations leading to the return of the indictments in that Court in 1960." (211 F. Supp. at 732.) Independent legal authority, therefore, exists in

the legitimate exercise of discovery of these documents, which are relevant and material to the issues in the instant litigation.

The examination of the material sought would not be in violation of Rule 6(e) in this instance because the reasons for maintaining secrecy do not apply or apply only to an insignificant degree. Even were Rule 6(e) found to be applicable, petitioners have demonstrated a compelling need for a order directing such documents to be made available for inspection.

CONCLUSION

The trial court has discretion to permit private litigants to inspect grand jury transcripts and to make available to private litigants all documents produced to a grand jury pursuant to a federal grand jury subpoena. If Rule 6(e) is applicable, the party seeking access to such transcripts or documents must demonstrate a sufficient need for the transcripts or documents. When Rule 6(e) is no longer applicable, access to grand jury material is more readily given. In the instant case, the reasons for Rule 6(e) are inapplicable or applicable only to an insignificant degree. Petitioners have also demonstrated a particular need which in and of itself constitutes adequate reason for allowing petitioners access to the transcripts and documents.

Upon the foregoing, petitioners respectfully request this Court to make available for inspection the grand jury transcripts which were made available to Phillips and Douglas, and an order directing that all documents produced by Phillips and Douglas pursuant to the grand jury subpoena be produced to petitioners.

DATED this 15th day of December, 1976.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, and COINOCO, *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent.*	PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA No. Misc. 5706

The petitioners, plaintiffs in two actions, Civil Nos. 73-212 Tuc-JAW and 73-191 Tuc-WCF, now pending in the United States District Court for the District of

Arizona, by and through their attorneys of record, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby move the United States District Court, Central District of California to make available for inspection by petitioners' attorneys of record, all transcripts of grand jury testimony which were made available to Phillips Petroleum Company ("Phillips") and Douglas Oil Company ("Douglas") in *United States v. Phillips, et al.,* Criminal Docket No. 75-377, filed in the United States District Court, Central District of California and to order the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice to produce all documents produced by Phillips and Douglas which were subpoenaed by the grand jury in *United States v. Phillips, et al.,* No. 75-377, said documents currently believed to be in the custody of the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice pursuant to an impounding order issued by the United States District Court, Central District of California.

As more fully set forth in the appended memorandum of points and authorities filed herewith, this Petition is made on the grounds that:

(1) Petitioners are in need of said grand jury transcripts and documents produced pursuant to the grand jury subpoena in order to show that Phillips and Douglas have perjured themselves in answers to certain interrogatories propounded to them by petitioners Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco in connection with *Petrol Stops Northwest v. Continental Oil Company, et al.,* Civ. No. 73-212 Tuc-JAW and *Gas-A-Tron, et al., v. Union Oil Company, et al.,* Civ. No. 73-191 TUC-WCF, now pending in the United States District Court for the District of Arizona;

(2) The disclosure of the transcripts will not invade the secrecy of the grand jury in that the documents have already been inspected by the defendants in *U.S. v. Phillips, et al.*, No. 75-377, who are also defendants in the actions listed above now pending in the Arizona District Court.

(3) The production of material subpoenaed by the grand jury will not invade the secrecy of the grand jury;

(4) The transcripts and documents are material and relevant to the pending civil antitrust action and their production and disclosure will further the efficient administration of justice; and

(5) It would be inequitable and adverse to the principles of federal discovery to allow one party (defendants Phillips and Douglas) access to government documents and not the other (petitioners).

On the basis of the foregoing and the memorandum of points and authorities submitted herewith, petitioners pray this Court to allow petitioners' counsel of record to examine, inspect, copy or produce all transcripts of grand jury testimony which were made available to Phillips and Douglas in *United States v. Phillips, et al.*, No. 75-377, and to direct the Department of Justice to produce all documents, records and files in its custody and possession which were produced by Phillips and Douglas pursuant to grand jury subpoena in *United States v. Phillips, et al.*, No. 75-377.

DATED this 1st day of December, 1976.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; FLETCHER OIL & REFINING COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; and MACMILLAN RING-FREE OIL COMPANY, INC., *Defendants.*	Criminal No. . . . . INDICTMENT FOR VIOLATION OF TITLE 15 U.S.C. § 1 (Sherman Antitrust Act) Filed: . . . . .

INDICTMENT

The Grand Jury charges:

I. DEFINITIONS

1. As used herein the term:

(a) "Rebrand gasoline" shall mean gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner; and

(b) "Western area" shall mean the States of California, Oregon, Washington, Nevada, and Arizona.

II. DEFENDANTS

2. Phillips Petroleum Company (Phillips) is hereby indicted and made a defendant herein. Phillips is a Delaware corporation, with its principal office in Bartlesville, Oklahoma. In 1970, Phillips had assets in excess of $3 billion and sales in excess of $2 billion, including sales of approximately 350 million gallons of rebrand gasoline in the Western area, of which approximately 180 million gallons were sold to Golden Eagle Refining Company, Inc.

3. Douglas Oil Company of California (Douglas), is hereby indicted and made a defendant herein. Douglas, a wholly-owned subsidiary of Continental Oil Corporation, is a California corporation with its principal office in Costa Mesa, California. In 1970, Douglas had assets of about $58 million and sales of approximately 100 million gallons of rebrand gasoline in the Western area.

4. Powerine Oil Company (Powerine) is hereby indicted and made a defendant herein. Powerine is a California corporation with its principal office in Santa Fe Springs, California. In 1970, Powerine had assets of $30 million, and sales in excess of $50 million, including sales of approximately 190 million gallons of rebrand gasoline in the Western area.

5. Fletcher Oil & Refining Company (Fletcher) is hereby indicted and made a defendant herein. Fletcher is a California corporation with its principal office in Wilmington, California. In 1970, Fletcher had assets in excess of $9 million and sales in excess of $30 million, including sales of approximately 90 million gallons of rebrand gasoline in the Western area.

6. Golden Eagle Refining Company, Inc. (Golden Eagle) is hereby indicted and made a defendant herein. Golden Eagle, a wholly-owned subsidiary of Ultramar Co. Ltd., is a Delaware corporation with its principal office in Los Angeles, California. In 1970, Golden Eagle had assets in excess of $21 million and sales in excess of $40 million, including sales of approximately 180 million gallons of rebrand gasoline in the Western area.

7. MacMillan Ring-Free Oil Company, Inc. (MacMillan) is hereby indicted and made a defendant herein. MacMillan is a Delaware corporation with its principal office in New York, New York. In 1970, MacMillan had assets in excess of $16 million and sales in excess of $35 million, including sales of approximately 70 million gallons of rebrand gasoline in the Western area.

III. CO-CONSPIRATORS

8. Various other corporations, firms and individuals, not made defendants in this indictment have participated as co-conspirators in the offense charged herein and have performed acts and made statements in furtherance thereof.

IV. TRADE AND COMMERCE

9. Gasoline is one of the primary products which results from the refining of crude oil. Most oil refiners, including the defendants, buy, sell and exchange gasoline among themselves and own or control trademarks or brand names under which gasoline is sold to the consumer. In addition, the defendants sell rebrand gasoline in the Western area to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public. In 1970, the defendants sold approximately 800 million gallons of rebrand gasoline with a wholesale value in excess of $90 million.

10. A substantial amount of the rebrand gasoline sold by the defendants in the Western area is refined from crude oil which is produced in states other than California and shipped into California to be refined. Also, there is a substantial, regular and continuous flow of defendant's rebrand gasoline to buyers located outside the state where such gasoline is refined.

V. OFFENSE CHARGED

11. Beginning at least as early as July 1970, the exact date being to the grand jurors unknown, and continuing thereafter at least through 1971, [the defendants and co-conspirators have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce] in violation of Section 1 of the Act of Congress of July 2, year 1890, *(sic)* as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to increase, fix, stabilize and maintain the price of rebrand gasoline.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

VI. EFFECTS

14. The aforesaid combination and conspiracy has had, among other things, the following effects:

(a) the price of rebrand gasoline has been *raised,* fixed, stabilized and maintained *at artificial and non-competitive* levels;

(b) price competition in the sale of rebrand gasoline has been suppressed; and

(c) customers buying rebrand gasoline have been deprived of the opportunity to buy rebrand gasoline in a free and unrestricted market.

VII. JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out by the defendants and co-conspirators in part within the Central District of California, and within the jurisdiction of this Court, within the five years preceding the return of this indictment.

DATED:

A TRUE BILL

Foreman	RAYMOND P. HERNACKI
THOMAS E. KAUPER *Assistant Attorney General*	STANLEY E. DISNEY
BADDIA J. RASHID	EDWIN D. HAUSMANN
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; FLETCHER OIL & REFINING COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; and MACMILLAN RING-FREE OIL COMPANY, INC., *Defendants.*	Civil No. 75 974HP COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION OF TITLE 15 U.S.C. § 1 (Sherman Antitrust Act) Filed:

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the above-named defendants, as hereinafter alleged, of Section 1 of said Act, as amended (15 U.S.C. § 1).

2. Each of the defendants maintains an office, transacts business or is found within the Central District of California.

II. DEFINITIONS

3. As used herein the term:

(a) "Rebrand gasoline" shall mean gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner; and

(b) "Western area" shall mean the States of California, Oregon, Washington, Nevada, and Arizona.

III. DEFENDANTS

4. Phillips Petroleum Company (Phillips) is made a defendant herein. Phillips is a Delaware corporation with its principal office in Bartlesville, Oklahoma. In 1970, Phillips had assets in excess of $3 billion and sales in excess of $2 billion, including sales of approximately 350 million gallons of rebrand gasoline in the Western area of which approximately 180 million gallons were sold to Golden Eagle Refining Company, Inc.

5. Douglas Oil Company of California (Douglas) is made a defendant herein. Douglas, a wholly-owned subsidiary of Continental Oil Corporation, is a California corporation with its principal office in Costa Mesa, California. In 1970, Douglas had assets of approximately

$58 million and sales of approximately 100 million gallons of rebrand gasoline in the Western area.

6. Powerine Oil Company (Powerine) is made a defendant herein. Powerine is a California corporation with its principal office in Santa Fe Springs, California. In 1970, Powerine had assets in excess of $30 million, and sales in excess of $50 million, including sales of approximately 190 million gallons of rebrand gasoline in the Western area.

7. Fletcher Oil & Refining Company (Fletcher) is made a defendant herein. Fletcher is a California corporation with its principal office in Wilmington, California. In 1970, Fletcher had assets in excess of $9 million and sale in excess of $30 million, including sales of approximately 90 million gallons of rebrand gasoline in the Western area.

8. Golden Eagle Refining Company, Inc. (Golden Eagle) is made a defendant herein. Golden Eagle, a wholly-owned subsidiary of Ultramar Co. Ltd., is a Delaware corporation with its principal office in Los Angeles, California. In 1970 Golden Eagle had assets in excess of $21 million and sales in excess of $40 million, including sales of approximately 180 million gallons of rebrand gasoline in the Western area.

9. MacMillan Ring-Free Oil Company, Inc. (MacMillan) is made a defendant herein. MacMillan is a Delaware corporation with its principal office in New York, New York. In 1970, MacMillan had assets in excess of $16 million and sales in excess of $35 million, including sales of approximately 70 million gallons of rebrand gasoline in the Western area.

IV. CO-CONSPIRATORS

10. Various other corporations, firms and individuals not made defendants in this complaint have participated

as co-conspirators in the violation alleged herein and have performed acts and made statements in furtherance thereof.

V. TRADE AND COMMERCE

11. Gasoline is one of the primary products which results from the refining of crude oil. Most oil refiners, including the defendants, buy, sell and exchange gasoline among themselves and own or control trademarks or brand names under which gasoline is sold to the consumer. In addition, the defendants sell rebrand gasoline in the Western area to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public. In 1970, the defendants sold approximately 800 million gallons of rebrand gasoline with a wholesale value in excess of $90 million.

12. A substantial amount of the rebrand gasoline sold by the defendants in the Western area is refined from crude oil which is produced in states other than California and shipped into California to be refined. Also, there is a substantial, regular and continuous flow of defendant's rebrand gasoline to buyers located outside the state where such gasoline is refined.

VI. VIOLATION ALLEGED

13. Beginning at least as early as July 1970, the exact date being to the plaintiff unknown, and continuing thereafter at least through 1971, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to increase, fix, stabilize and maintain the price of rebrand gasoline.

15. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

VII. EFFECTS

16. The aforesaid combination and conspiracy had had, among other things, the following effects:

(a) the price of rebrand gasoline has been raised, fixed, stabilized and maintained at artificial and non-competitive levels;

(b) price competition in the sale of rebrand gasoline has been suppressed; and

(c) customers buying rebrand gasoline have been deprived of the opportunity to buy rebrand gasoline in a free and unrestricted market.

PRAYER

WHEREFORE, the plaintiff prays:

A. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

B. That each of the defendants, its successors, subsidiaries and transferees, and the respective officers, di-

rectors, agents, and employees thereof, and all other persons acting or claiming to act on its behalf, be perpetually enjoined and restrained from in any manner, directly or indirectly, continuing, maintaining or reviving the conspiracy, and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program or device having a similar purpose or effect.

C. That plaintiff have such other, further, general and different relief as the Court may deem just and proper in the premises.

D. That plaintiff recover the costs of this suit.

THOMAS E. KAUPER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PETROL STOPS NORTHWEST,
Plaintiff,
vs.
CONTINENTAL OIL COMPANY;
DOUGLAS OIL COMPANY;
GULF OIL COMPANY;
SHELL OIL COMPANY;
EXXON CORPORATION;
MOBIL OIL CORPORATION;
UNION OIL COMPANY OF CALIFORNIA;
AMOCO OIL COMPANY;
STANDARD OIL COMPANY OF CALIFORNIA;
STANDARD OIL COMPANY OF INDIANA;
PHILLIPS PETROLEUM COMPANY;
and, ARMOUR OIL COMPANY;
Defendants.

COMPLAINT
(Jury Trial Demanded)
Civil No. 73-212
TUC
JAW

The plaintiff complains of the above-named defendants and demanding trial by jury alleges as follows:

JURISDICTION

1. This Complaint is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16

of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 731, as amended (15 U.S.C. 15, 26). The plaintiff seeks to recover treble the amount of damages sustained by the plaintiff by reason of the defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended (15 U.S.C. 1, 2), commonly known as the Sherman Act, and to prevent and restrain such violations.

2. The defendants are presently qualified to do business in the State of Arizona and in fact have transacted business at all times alleged herein within the above-described district. The predatory conduct of the defendants alleged herein was undertaken and implemented in part within the above-described district.

3. The business of producing, transporting, manufacturing and marketing petroleum and refined petroleum products is within and directly and substantially affects trade and commerce among the several states.

DESCRIPTION OF THE PARTIES

4. The plaintiff, Petrol Stops Northwest, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in the states of Arizona, California, Oregon, Washington, Idaho, Minnesota, Missouri and Arkansas, through independent gasoline stations. Petrol Stops Northwest distributes gasoline at retail through gasoline stations owned or leased and operated by Petrol Stops Northwest and through gasoline stations located on the premises of small grocery stores and other businesses which are operated as a joint venture between Petrol Stops Northwest and the owner-operators of these businesses. Prior to January 1, 1973, Petrol Stops Northwest distributed gasoline through 104 gasoline stations selling an annual volume of approximately 70 million gallons of

gasoline in 1972. Since January 1, 1973, the plaintiff's supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in this Complaint and plaintiff has seriously curtailed its business operations and been forced to close many of its outlets.

5. The defendant Continental Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. The defendant Douglas Oil Company is a wholly-owned subsidiary of Continental Oil Company which markets ostensively as an independent at the retail level under various brands including "Douglas", "Fast Gas", "Econo" and "Nugget". Douglas also supplies gasoline to plaintiff at wholesale through the defendant Armour Oil Company. Continental Oil Company in 1972 had gross operating income of approximately $3.4 billion, net income of $170 million and current assets in excess of $957 million. Continental Oil Company marketed gasoline under the "Conoco" brand throughout the United States. Continental Oil Company has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Conoco" & "Douglas" brands. In Arizona, California, Oregon and Washington, Continental Oil Company markets refined petroleum products including gasoline through branded jobbers and dealers under the Conoco and Douglas brands. The gasoline sold by Continental Oil Company is manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its customers in Arizona by way of pipeline across state lines. The gasoline marketed by Continental Oil Company moves in the flow of interstate commerce.

6. The defendant Gulf Oil Company is a major integrated oil company engaged in the production, transpor-

tation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Gulf in 1973 had gross operating income of approximately $6.2 billion, net income of $447 million and current assets in excess of $2.9 billion. Gulf Oil Company marketed gasoline under the "Gulf" brand name throughout the United States. Gulf has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Gulf" brand. In Arizona, California, Washington and Oregon Gulf has marketed gasoline through branded jobbers and dealers under the Gulf brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Gulf moves in the flow of interstate commerce.

7. The defendant Shell Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing, and marketing of petroleum and refined petroleum products, including gasoline, on a world-wide basis. Shell in 1972 had gross income in excess of $4 billion, net income in excess of $260 million, and assets in excess of $1.5 billion. Shell markets gasoline under the "Shell" brand name throughout the continental United States. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Shell" brand. Shell supplies its dealers and jobbers in Arizona, California, Washington and Oregon with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipelines across state lines. Gasoline marketed by Shell moves and has moved in the flow of interstate commerce.

8. The defendant Exxon Corporation, formerly Standard Oil of New Jersey, is the world's leading integrated petroleum enterprise and is engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Exxon in 1971 had gross operating income in excess of $20 billion, net income in excess of $1.5 billion and total current assets in excess of $7 billion. Exxon markets gasoline under the "Exxon", "Humble" and "Esso" brands throughout the world. Exxon has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Exxon" brand. It has entered into extensive agreements for the exchange of gasoline and gasoline products with other defendants and co-conspirators which permit it to expand its geographic scope of operation and attain a level of integration far beyond the capacity of its facilities and supply. The gasoline marketed by Exxon in Arizona moves and has moved in the flow of interstate commerce.

9. The defendant Mobil Oil Corporation is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Mobil in 1971 had gross income in excess of $8.2 billion, net income in excess of $1.1 billion, and assets in excess of $8.4 billion. Mobil markets gasoline under the "Mobil" brand name in the western, midwestern and southeastern United States. Mobil had undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Mobil" brand. Mobil supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Mobil in

Arizona moves and has moved in the flow of interstate commerce.

10. The defendant Union Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Union in 1972 had gross sales of approximately $2.5 billion, net earnings of $121.9 million and assets in excess of $2.6 billion. Union marketed gasoline under the "Union 76" brand name throughout the United States. Union has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Union 76" brand. In Arizona, California, Washington and Oregon, Union has marketed gasoline through branded jobbers and dealers under the Union brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Union Oil Company moves in the flow of interstate commerce.

11. The defendant Amoco Oil Company is a wholly-owned subsidiary of defendant Standard Oil Company of Indiana. Standard Oil Company of Indiana is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Standard Oil of Indiana in 1971 had gross sales of approximately $8.5 billion, net income in excess of $341 million, and assets in excess of $5.6 billion. Amoco Oil Company (formerly known under the firm name of American Oil Company) is or has been engaged in the manufacturing and marketing of petroleum and refined petroleum products, including gasoline, throughout the continental United States, including California,

Washington and Oregon. Amoco markets or has marketed gasoline in Arizona under the "Amoco" and "Standard" brands. Prior to January 1, 1973, Amoco also marketed under the "American" brand. In Arizona, Amoco markets gasoline through branded dealers and jobbers and on a company-operated basis. Amoco has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its brand names. Amoco supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Amoco in Arizona moves in the flow of interstate commerce.

12. The defendant Standard Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Standard Oil Company in 1972 had gross sales of approximately $5.8 billion, net earnings of $6.4 million, and assets in excess of $2.3 billion. Standard markets gasoline under the "Chevron" and "Standard" brand names throughout the continental United States. Standard Oil Company of California has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Chevron" and "Standard" brands. Standard supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Standard in Arizona moves and has moved in the flow of interstate commerce.

13. The defendant Phillips Petroleum Company is a major integrated oil company engaged in the production,

transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. In 1971, Phillips Petroleum had gross income in excess of $2.3 billion, net income in excess of $132 million, and assets in excess of $3.7 billion. Phillips Petroleum markets gasoline under the "Phillips" brand name throughout the continental United States. Phillips Petroleum has also undertaken to market gasoline on a self-serve basis under various secondary or "fighting brands" including "Seaside", "Red Dot" and "Blue Goose". It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Phillips", "Seaside", "Red Dot" and "Blue Goose" brands. Phillips supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Phillips in Arizona moves and has moved in the flow of interstate commerce.

14. The defendant Armour Oil Company is a wholesaler and retailer of refined petroleum products and operates a large fleet of tank trucks as a common carrier in the transporting of the petroleum products which Armour Oil sells at the wholesale and retail levels. Armour Oil sells refined petroleum products at wholesale to various independent retail markets in California, Oregon, Washington and Arizona and distributes and transports refined petroleum products for various defendants. Armour Oil also sells refined petroleum products through retail outlets in the eastern portion of the United States and Hawaii under the "Armour" brand. Armour Oil Company has sold gasoline to the plaintiff in Washington, Oregon, California and Arizona. The gasoline which Armour Oil Company has sold to the plaintiff was purchased from the defendants Douglas Oil Company and Gulf Oil Company. Beginning in November of

1972 the defendant Armour Oil Company, Douglas Oil Company, Continental Oil Company and Gulf Oil Company, in furtherance of the contracts, combinations and conspiracies alleged herein, have severely limited and restricted the quantity of gasoline to be sold to the plaintiff. Armour has continued to limit and restrict the quantity of gasoline sold to the plaintiff by Armour and to refuse to sell to the plaintiff the quantities of gasoline to which it is entitled from 1972 until the present.

CO-CONSPIRATORS

15. The major integrated oil companies, including Signal Oil & Gas Company and Time Oil Company, that have not been named at this time as defendants in this Complaint have shared a common business motivation with the named defendant major integrated oil companies to dominate and control the manufacture and distribution of petroleum and refined petroleum products in the United States and have participated with the named defendants in the illegal contracts, combinations and conspiracies alleged in this Complaint and are designated in this Complaint as co-conspirators of the named defendants.

SHERMAN ACT OFFENSES

16. Commencing at a period of time four years prior to the filing of this Complaint, the exact date being unknown to the plaintiffs, and continuing uninterruptedly up to and including the date of the filing of this Complaint, the defendants and their co-conspirators have contracted, combined and conspired in restraint of trade in the manufacture, sale and distribution of petroleum and refined petroleum products and have combined and conspired to monopolize trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products and each of the defendants has at-

tempted to monopolize trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products in violation of Sections 1 and 2 of the Sherman Act. Such continuing contracts, combinations, conspiracies and attempts to monopolize have substantially and directly affected trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products among the several states and have substantially and directly affected trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products in the states of California, Oregon and Washington. Specifically the defendants and their co-conspirators have done the following things:

A. The defendants and their co-conspirators have combined and conspired to dominate and control the manufacture and distribution of petroleum and refined petroleum products and to suppress and eliminate competition in the manufacture and distribution of petroleum and refined petroleum products in the United States.

B. The defendants and their co-conspirators have combined and conspired to conduct their petroleum operations on an integrated basis including the production, transportation, manufacture and distribution of petroleum and refined petroleum products with the purpose and effect of suppressing and eliminating competition from independent and non-integrated refiners and marketers of petroleum and refined petroleum products, including gasoline.

C. The defendants and their co-conspirators have combined and conspired to control and dominate the refining capacity in the United States with the purpose and effect of excluding and limiting the competition of independent refiners in the United States.

D. The defendants and their co-conspirators have combined and conspired to artificially limit the supply and distribution of refined petroleum products, including gasoline, in the United States.

E. The defendants and their co-conspirators have combined and conspired to enter into extensive product and exchange agreements on petroleum and refined petroleum products, including gasoline, among themselves so as to permit the defendants and their co-conspirators to dominate and control the manufacture and distribution of petroleum and refined petroleum products, including gasoline, in the United States and have combined and conspired to refuse to supply and to restrict the supply of petroleum and refined petroleum products, including gasoline, to independent refiners and independent marketers in the United States, including the plaintiff.

F. The defendants and their co-conspirators have combined and conspired to market and distribute refined petroleum products, including gasoline, only on a branded basis in the United States and to tie the sale and distribution of refined petroleum products, including gasoline, to the license of their respective trademarks with the purpose and effect of preventing their branded dealers and jobbers from obtaining and purchasing refined petroleum products, including gasoline, by specification from independent refiners and marketers and with the purpose and effect of restricting and eliminating the supply of refined petroleum products, including gasoline, available to independent marketers, including the plaintiff.

G. The defendants and their co-conspirators have combined and conspired to invest in gasoline stations on an uneconomic basis, to overconstruct gasoline stations and to maintain the operation of uneconomic

gasoline stations with the purpose and effect of dominating and controlling the supply and distribution of refined petroleum products, including gasoline, in the United States and with the purpose and effect of suppressing and eliminating the competition of independent refiners and marketers of refined petroleum products, including gasoline, in the United States.

H. The defendants and their co-conspirators have combined and conspired to tie the lease of gasoline stations in the United States to the sale and distribution of refined petroleum products, including gasoline, with the purpose and effect of dominating and controlling the supply and distribution of refined petroleum products, including gasoline, in the United States and with the purpose and effect of suppressing and eliminating the competition of independent refiners and marketers of refined petroleum products, including gasoline, in the United States.

I. The defendants and their co-conspirators have combined and conspired to lease gasoline stations to independent businessmen on short-term leases with the purpose and effect of controlling their purchasing and pricing decisions on the sale and distribution of refined petroleum products, including gasoline.

J. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in California, Oregon and Washington, have combined and conspired with their branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in California, Oregon and Washington.

K. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline, have

combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in California, Oregon and Washington.

L. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in California, Oregon and Washington, have combined and conspired to refuse to supply and to restrict the supply of gasoline to independent marketers in California, Oregon and Washington.

M. The defendants and their co-conspirators have combined and conspired to fix and maintain artificially high stable prices for crude oil in the United States.

N. The defendants and their co-conspirators have combined and conspired to fix, raise and maintain the price of gasoline charged to independent marketers of gasoline, including the plaintiff.

O. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to fix the price at which gasoline was sold by the defendants' and their co-conspirators' branded dealers and jobbers.

P. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to engage in prolonged and intensified price wars.

Q. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the

competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to sell gasoline below cost through their branded channels of distribution.

R. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to grant and credit their branded dealers and jobbers with substantial amounts of depressed price allowances.

S. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to fix the retail price of gasoline at major branded gasoline stations.

T. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to severely limit and allocate the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

U. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to refuse to supply gasoline to independent marketers, including the plaintiff.

V. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has acquired independent refiners and independent marketers in California, Oregon and Washington and the effect of each such acquisition and of all such acquisitions on a combined basis may be substantially to lessen competition in the sale and distribution of gasoline.

W. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has consistently sold gasoline below cost in California, Oregon and Washington.

X. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has engaged in prolonged and destructive predatory price wars in the sale and distribution of gasoline in California, Oregon and Washington.

Y. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has granted and credited its branded dealers and jobbers with substantial amounts of depressed price allowances in the sale and distribution of gasoline in California, Oregon and Washington.

Z. Each of the defendants has combined and conspired with its branded dealers and jobbers to fix the resale price of gasoline marketed at such dealers and jobbers branded stations in California, Oregon and Washington.

AA. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has combined and conspired with its branded dealers and jobbers to fix the resale price of gasoline marketed at such dealers and jobbers branded stations in California, Oregon and Washington.

BB. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has refused to supply gasoline to independent marketers, including the plaintiff, in California, Oregon and Washington.

CC. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has severely limited and allocated the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

DD. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline with the specific intent of controlling the prices of such competitors, has combined and conspired with its branded dealers and jobbers to refuse to supply gasoline to independent marketers of gasoline in California, Oregon and Washington.

EE. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such

competitors, has combined and conspired with its branded dealers and jobbers to severely limit and allocate the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

17. The defendants and their co-conspirators have done the things that they have combined, conspired and attempted to do and such illegal contracts, combinations, conspiracies and attempts to monopolize have substantially and directly injured and affected trade and commerce among the several states in the sale and distribution of gasoline.

18. The defendants and their co-conspirators have fradulently concealed the things which they have illegally contracted, combined, conspired and attempted to do.

19. By reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as set forth in this Complaint, the plaintiff has been injured in its business and property, including a loss of profits and loss of good will, in the amount of approximately $5,160,000, which amount is the best approximation the plaintiff can now make of its damages prior to the completion of discovery and which amount should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiff is therefore entitled to recover, jointly and severally, from each of the defendants the amount of $15,480,000.

20. Unless the defendants are restrained by this Court temporarily and permanently from continuing the violations of Sections 1 and 2 of the Sherman Act, as set forth in this Complaint, the plaintiff will be irreparably damaged and its very existence as an independent marketer of gasoline threatened.

21. Unless the defendants are temporarily and permanently compelled to supply the plaintiff with refined fuels, including gasoline, in at least the amounts that

defendants distributed to plaintiff in 1972, plaintiff will be severely and irreparably damaged.

WHEREFORE, the plaintiff demands judgment against the defendants for injury to its business and property as follows:

1. That the Court adjudge and decree that the contracts, combinations, conspiracies, attempts to monopolize and acts pursuant thereto, as alleged in this Complaint, be adjudged in violation of Sections 1 and 2 of the Sherman Act.

2. That the plaintiff Petrol Stops Northwest have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in this Complaint, the amount of $5,160,000, which amount should be trebled to $15,480,000, as required by law.

3. That the defendants Armour Oil Company, Continental Oil Company, its subsidiary, Douglas Oil Company and Gulf Oil Company be temporarily and perpetually enjoined and restrained from combining and conspiring to limit and restrict the quantity of gasoline sold and distributed to the plaintiff Petrol Stops Northwest and from refusing to sell gasoline to the plaintiff in violations of Sections 1 and 2 of the Sherman Act.

4. That the defendants Continental Oil Company and Gulf Oil Company be restrained and enjoined from refusing to sell gasoline directly to the plaintiff in the amounts that they provided gasoline to the defendant Armour Oil Company for distribution and resale to the plaintiff during 1972.

5. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Sections 1 and 2 of the Sherman Act as

alleged in this Complaint. The plaintiff further prays that the Court adjudge and decree appropriate remedial equitable relief eliminating the defendants' domination and control of the manufacture and distribution of petroleum and refined petroleum products in the United States, including such divestiture as may be found necessary to open the manufacture and distribution of petroleum and refined petroleum products to free and unrestrained competition.

6. That the plaintiff have judgment against the defendants for the plaintiff's costs incurred in prosecuting this action and in addition thereto, a reasonable attorney's fee as required by law under Section 4 of the Clayton Act, 15 U.S.C. § 15.

7. The plaintiff prays for such other and further relief as the Court in the course of this action may deem just and proper.

DATED this 13th day of December, 1973.

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PLEASE TAKE NOTICE:
JURY TRIAL DEMANDED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GAS-A-TRON OF ARIZONA and COINOCO, a Partnership,

Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA;
AMOCO OIL COMPANY;
STANDARD OIL COMPANY OF INDIANA;
SHELL OIL COMPANY;
MOBIL OIL CORPORATION;
STANDARD OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY;
EXXON CORPORATION; and
DIAMOND SHAMROCK,

Defendants.

COMPLAINT

(Jury Trial Demanded)
Civil No. 73-191 TUC-WCF

The plaintiffs complain of the above-named defendants and demanding trial by jury allege as follows:

JURISDICTION

1. This Complaint is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16 of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 731, as amended (15 U.S.C. §§ 15, 26). The plaintiffs

seek to recover treble the amount of damages sustained by the plaintiffs by reason of the defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended (15 U.S.C. §§ 1, 2), commonly known as the Sherman Act and subparagraph (a) of Section 2 of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 730, as amended (15 U.S.C. § 13(a)), commonly known as the Robinson-Patman Act, and to prevent and restrain such violations.

2. The defendants are presently qualified to do business in the State of Arizona and in fact have transacted business at all times alleged herein within the above-described district. The predatory conduct of the defendants alleged herein was undertaken and implemented in part within the above-described district.

3. The business of producing, transporting, manufacturing and marketing petroleum and refined petroleum products is within and directly and substantially affects trade and commerce among the several states.

DESCRIPTION OF THE PARTIES

4. The plaintiff, Gas-A-Tron of Arizona, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in Tucson, Arizona, and in the Nogales and Oracle Junction areas, through independent self-serve gasoline stations. Gas-A-Tron distributes gasoline at retail through gasoline stations leased and operated by Gas-A-Tron, and through gasoline stations located on the premises of small grocery stores and other businesses which are operated as a joint venture between Gas-A-Tron and the owner-operators of these businesses. Prior to January 1, 1973, in the Tucson area, Gas-A-Tron distributed gasoline through 26 gasoline stations selling an annual volume of approximately 13 million gallons of gasoline in 1972. Since January 1, 1973, the plaintiff's

supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in Count I.

5. The plaintiff, Coinoco, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in Tucson, Arizona, through independent self-serve gasoline stations. Coinoco distributes gasoline at retail through gasoline stations leased and operated by Coinoco. Prior to January 1, 1973, in the Tucson area, Coinoco distributed gasoline through 2 gasoline stations selling an annual volume of approximately 700,000 gallons of gasoline in 1971. Since January 1, 1973, the plaintiff's supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in Count I and Coinoco has been forced to cease its retail operations.

6. The defendant Union Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Union in 1972 had gross sales of approximately 2.5 billion dollars, net earnings of 121.9 million dollars and assets in excess of 2.6 billion dollars. Union marketed gasoline under the "Union 76" brand name throughout the United States. Union has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Union 76" brand. In Arizona Union has marketed gasoline through branded jobbers and dealers under the Union brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Union Oil Company moves in the flow of interstate commerce.

7. The defendant Amoco Oil Company is a wholly-owned subsidiary of defendant Standard Oil Company of

Indiana. Standard Oil Company of Indiana is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Standard Oil of Indiana in 1971 had gross sales of approximately $85 billion, net income in excess of $341 million, and assets in excess of $5.6 billion. Amoco Oil Company (formerly known under the firm name American Oil Company) is engaged in the manufacturing and marketing of petroleum and refined petroleum products, including gasoline, throughout the continental United States. Amoco markets gasoline in Arizona under the "Amoco" and "Standard" brands. Prior to January 1, 1973, Amoco also marketed under the "American" brand. In Arizona, Amoco markets gasoline through branded dealers and jobbers and on a company-operated basis. Amoco has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its brand names. Amoco supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Amoco in Arizona moves in the flow of interstate commerce.

8. The defendant Shell Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing, and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Shell in 1972 had gross income in excess of $4 billion, net income in excess of $260 million, and assets in excess of $1.5 billion. Shell markets gasoline under the "Shell" brand name throughout the continental United States. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Shell" brand. Shell supplies its dealers and jobbers in Arizona with gasoline

manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Shell moves and has moved in the flow of interstate commerce.

9. The defendant Mobil Oil Corporation is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Mobil in 1971 had gross income in excess of $8.2 billion, net income in excess of $1.1 billion, and assets in excess of $8.4 billion. Mobil markets gasoline under the "Mobil" brand name in the western, midwestern and southeastern United States. Mobil has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Mobil" brand. Mobil supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Mobil in Arizona moves and has moved in the flow of interstate commerce.

10. The defendant Standard Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Standard Oil Company in 1972 had gross sales of approximately $5.8 billion, net earnings of $6.4 million, and assets in excess of $2.3 billion. Standard markets gasoline under the "Chevron" and "Standard" brand names throughout the continental United States. Standard Oil Company of California has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Chevron" and "Standard" brands. Standard supplies its dealers and jobbers in Arizona with gasoline manu-

factured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Standard in Arizona moves and has moved in the flow of interstate commerce.

11. The defendant Phillips Petroleum Company is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. In 1971, Phillips Petroleum had gross income in excess of $2.3 billion, net income in excess of $132 million, and assets in excess of $3.7 billion. Phillips Petroleum markets gasoline under the "Phillips" brand name throughout the continental United States. Phillips Petroleum has also undertaken to market gasoline on a self-serve basis under the "Blue Goose" brand. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Phillips" and "Blue Goose" brands. Phillips supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Phillips in Arizona moves and has moved in the flow of interstate commerce.

12. The defendant Exxon Corporation, formerly Standard Oil of New Jersey, is the world's leading integrated petroleum enterprise and is engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Exxon in 1971 had gross sales in excess of $3.3 billion, net income in excess of $1.5 billion, and total assets in excess of $20.3 billion. Exxon markets gasoline under the "Exxon", "Humble" and "Esso" brands throughout the world. Exxon has undertaken

extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Exxon" brand. It has entered into extensive agreements for the exchange of gasoline and gasoline products with other defendants and co-conspirators which permit it to expand its geographic scope of operation and attain a level of integration far beyond the capacity of its facilities and supply. The gasoline marketed by Exxon in Arizona moves and has moved in the flow of interstate commerce.

13. The defendant Diamond Shamrock is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, in the southwestern and Rocky Mountain areas of the United States. Shamrock in 1972 had net sales in excess of $600 million, net income in excess of $33 million, and current assets in excess of $234 million. Shamrock markets gasoline under the "Shamrock" brand name. Shamrock has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Shamrock" brand. Shamrock supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Shamrock in Arizona moves and has moved in the flow of interstate commerce.

CO-CONSPIRATORS

14. The major integrated oil companies, including Texaco, Atlantic Richfield Company, Conoco and Gulf, that have not been named at this time as defendants in this Complaint have shared a common business motivation with the named defendant major integrated oil companies to dominate and control the manufacture and

distribution of petroleum and refined petroleum products in the United States and have participated with the named defendants in the illegal contracts, combinations and conspiracies alleged in Count I of this Complaint and are designated in this Complaint as co-conspirators of the named defendants.

COUNT I

Sherman Act Offenses

15. Commencing at a period of time four years prior to the filing of this Complaint, the exact date being unknown to the plaintiffs, and continuing uninterruptedly up to and including the date of the filing of this Complaint, the defendants and their co-conspirators have contracted, combined and conspired in restraint of trade in the manufacture, sale and distribution of refined petroleum products, including gasoline, and have combined and conspired to monopolize trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, and have attempted to monopolize trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, in violation of Sections 1 and 2 of the Sherman Act. Such continuing contracts, combinations, conspiracies and attempts to monopolize have substantially and directly affected trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, among the several states and have substantially and directly affected trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, in the State of Arizona. Specifically, the defendants and their co-conspirators have done the following things:

A. Each of the defendants, with the specific intent of suppressing and eliminating the competition of

independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has consistently sold gasoline below cost in Tucson.

B. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to consistently sell gasoline below cost in Tucson.

C. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has engaged in prolonged and destructive predatory price wars in the sale and distribution of gasoline in Tucson, Arizona.

D. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to engage in prolonged and destructive predatory price wars in the sale and distribution of gasoline in Tucson, Arizona.

E. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent

marketers in such market, has granted and credited its branded dealers and jobbers with substantial amounts of depressed price allowances on the sale and distribution of gasoline.

F. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to grant and credit their branded dealers and jobbers with substantial amounts of depressed price allowances on the sale and distribution of gasoline.

G. Each of the defendants has combined and conspired with its branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

H. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has combined and conspired with its branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

I. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired with their branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

J. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has refused to supply gasoline to independent marketers in Tucson, Arizona.

K. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to refuse to supply gasoline to independent marketers in Tucson, Arizona.

L. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in Tucson, Arizona.

M. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to prevent independent marketers from marketing gasoline to the defendants' and their co-conspirators' branded dealers and jobbers.

N. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the

competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to severely limit and allocate the quantities of gasoline that independent marketers in Tucson could purchase for resale.

O. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to rechannel the supply and distribution of refined fuels, including gasoline, into their branded channels of distribution so as to restrict and limit the supply of refined fuels, including gasoline, available to independent marketers in the Tucson market.

P. The defendants and their co-conspirators have combined and conspired to dominate and control the domestic refining capacity of the United States, acquire monopoly power in the domestic refining capacity of the United States and suppress and eliminate independent competition in the manufacture of refined petroleum products in the United States.

Q. The defendants and their co-conspirators have combined and conspired to monopolize the domestic manufacture and distribution of refined petroleum products, including gasoline

(1) by refusing to supply crude oil to independent refiners,

(2) by maintaining artificially high stable prices on the sale of crude oil to independent refiners,

(3) by controlling the importation of crude oil and refined petroleum products into the United States,

(4) by restricting and limiting the access of independent refiners and marketers to the transmission of refined petroleum products on product pinelines,

(5) by engaging in extensive exchange agreements and product arrangements between the defendants and their co-conspirators so as to permit each of the defendants to operate as a major integrated oil company and by refusing to enter into exchange agreements with independent refiners and marketers and by limiting the geographic scope and product quantity of exchange agreements with independent refiners and marketers,

(6) by foreclosing independent refiners and marketers from the opportunity to market gasoline and diesel fuel to major branded jobbers and dealers,

(7) by restricting the supply of gasoline through major branded channels of distribution,

(8) by refusing to supply and limiting the supply of gasoline and diesel fuel to independent marketers,

(9) by maintaining artificially high stable prices for gasoline and diesel fuel sold to independent marketers for resale,

(10) by eliminating the spot or rack price market in the sale and distribution of gasoline,

(11) by engaging in prolonged and destructive predatory price wars in the sale and distribution of gasoline and diesel fuel, and

(12) by artificially creating product shortages for petroleum and refined petroleum products in the domestic United States.

16. The defendants and their co-conspirators have done the things that they have combined, conspired and attempted to do and such illegal contracts, combinations, conspiracies and attempts to monopolize have substantially and directly injured and affected trade and commerce among the several states in the sale and distribution of gasoline.

17. The defendants and their co-conspirators have fraudulently concealed the illegal contracts, combinations, conspiracies and attempts to monopolize alleged in paragraph 15 of this Complaint.

18. By reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as set forth in Count I of this Complaint, each of the plaintiffs has been injured in its business and property, including a loss of profits and loss of good will, in the amount of approximately $1,350,000 for Gas-A-Tron and $55,000 for Coinoco, which amount is the best approximation the plaintiffs can now make of their damages prior to the completion of discovery and which amount should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiffs are therefore entitled to recover, jointly and severally, from each of the defendants under Count I of this Complaint the amount of $4,050,000 for Gas-A-Tron and $165,000 for Coinoco.

19. Unless the defendants are restrained by this Court temporarily and permanently from continuing the violations of Sections 1 and 2 of the Sherman Act, as set forth in Count I of this Complaint, the plaintiffs will be irreparably damaged and their very existence as marketers of gasoline through independent self-serve gasoline stations in Arizona threatened.

COUNT II

Robinson-Patman Act Offenses

20. The allegations set forth in paragraphs 1 through 14 are hereby incorporated in Count II of this Complaint.

21. Each of the defendants in the course and conduct of its business operations as a major integrated oil company, commencing at a time over four years prior to the filing of this Complaint and continuing uninterruptedly up to the date of the filing of this Complaint, has discriminated directly and indirectly in price on the sale of gasoline between its branded jobbers and dealers in the Tucson market and its jobbers and dealers in other markets in Arizona and in other states, including Texas and New Mexico, in violation of Section 2(a) of the Robinson-Patman Act. Each defendant discriminated directly and indirectly in price on the sale of gasoline between its branded jobbers and dealers in the Tucson market and its jobbers and dealers in other markets in Arizona and in other states, including Texas and New Mexico, by continually selling gasoline to its branded jobbers and dealers in the Tucson market at substantially lower prices than the price at which it sold gasoline of like grade and quality at approximately the same time to its jobbers and dealers in other areas of the State of Arizona and in other states, including Texas and New Mexico. The gasoline sold by the defendants to their jobbers and dealers in Arizona and to their jobbers and dealers in other states, including Texas and New Mexico, was shipped across state lines by truck and by pipeline and moved in the flow of interstate commerce. The defendants have subsidized the lower discriminatory prices charged their branded jobbers and dealers in the Tucson market from their business operation in other markets in other states and at other levels of the defendants' integrated petroleum operation so that the defendants have subsidized the lower discriminatory prices in

the Tucson market from the funds that defendants have generated in other markets and at other levels of their integrated petroleum operations in interstate and foreign commerce.

22. The effect of the discriminations in price by the defendants on the contemporaneous sale of gasoline to their jobbers and dealers in the Tucson market as set forth in the preceding paragraph, may be to substantially lessen competition or to tend to create a monopoly or to injure or destroy or prevent competition in the sale and distribution of gasoline in the Tucson market.

23. The substantially lower discriminatory prices charged by the defendants to their jobbers and dealers may be to substantially lessen competition or to tend to create a monopoly or to injure or destroy or prevent competition in the sale and distribution of gasoline in the Tucson market, in that:

A. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants with the specific intent of suppressing and eliminating the competition of independent self-serve marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of independent self-serve marketers of gasoline at both wholesale and retail in such markets.

B. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants with the specific intent of eliminating the established differential between the price of gasoline marketed at major branded gasoline stations and the price of gasoline marketed at independent self-serve gasoline stations.

C. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson,

Arizona, market were consistently below the defendants' cost.

D. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market eroded and destroyed the competitive price structure in the sale and distribution of gasoline and led to sharply declining prices at the retail level in the sale and distribution of gasoline in the Tucson, Arizona, market.

E. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants for the purpose of prolonging and intensifying destructive price wars in the sale and distribution of gasoline in such market and had the effect of prolonging and intensifying destructive price wars in the sale and distribution of gasoline in the Tucson, Arizona, market.

24. By reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as set forth above in Count II of this Complaint, plaintiffs have been severely injured and damaged in their business and property, including the loss of profits and the loss of good will, in the amount of approximately $1,350,000 for Gas-A-Tron and $55,000 for Coinoco, which amounts are the best approximation that the plaintiffs can now make of their damages prior to the completion of discovery and which amounts should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiffs are, therefore, entitled to recover damages from each of the defendants under Count II of the Complaint in the amount of $4,050,000 for Gas-A-Tron and $165,000 for Coinoco.

25. Unless the defendants are temporarily and permanently restrained by this Court from continuing the violations of Section 2(a) of the Robinson-Patman Act, as set forth in Count II of this Complaint, plaintiffs will be

irreparably damaged and their very existence as marketers of gasoline through independent self-serve gasoline stations in Tucson, Arizona, threatened.

WHEREFORE, each of the plaintiffs demand judgment against the defendants for injury to its business and property as follows:

1. That the Court adjudge and decree that the contracts, combinations, conspiracies, attempts to monopolize and acts pursuant thereto, as alleged in Count I of this Complaint, be adjudged in violation of Sections 1 and 2 of the Sherman Act.

2. That the plaintiff Gas-A-Tron of Arizona have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in Count I the amount of $1,350,000, which amount should be trebled to $4,050,000, as required by law.

3. That the plaintiff Coinoco have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in Count I, the amount of $55,000, which amount should be trebled to $165,000, as required by law.

4. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Sections 1 and 2 of the Sherman Act as alleged in Court I of this Complaint. The plaintiffs further pray under Count I of this Complaint that the Court adjudge and decree appropriate remedial equitable relief eliminating the defendants' domination and control of the manufacture and distribution of petroleum and refined petroleum products in the United States, including such divestiture as may be found necessary to open the manufacture

and distribution of petroleum and refined petroleum products to free and unrestrained competition.

5. That the Court adjudge and decree that the illegal discriminatory pricing alleged in Count II of this Complaint, be adjudged in violation of Section 2(a) of the Robinson-Patman Act.

6. That the plaintiff Gas-A-Tron have against and receive from the defendants, jointly and severally, for the damages to its business and property by reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as alleged in Count II, the amount of $1,350,000, which amount should be trebled to $4,050,000, as required by law.

7. That the plaintiff Coinoco have against and receive from the defendants, jointly and severally, for the damages to its business and property by reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as alleged in Count II, the amount of $55,000, which amount should be trebled to $165,000, as required by law.

8. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Section 2(a) of the Robinson-Patman Act as alleged in Count II of this Complaint.

9. That the plaintiffs have judgment against the defendants for the plaintiffs' costs incurred in prosecuting this action and in addition thereto, a reasonable attorney's fee as required by law under Section 4 of the Clayton Act, 15 U.S.C. § 15.

10. The plaintiffs pray for such other and further relief as the Court in the course of this action may deem just and proper.

DATED this 2nd day of November, 1973.

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PLEASE TAKE NOTICE:
JURY TRIAL DEMANDED

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY,
Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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and Coinoco

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Petrol Stops Northwest, Gas-A-Tron of Arizona, and Coinoco respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari of Douglas Oil Company (hereinafter referred to as "Douglas") and Phillips Petrol Company (hereinafter referred to as "Phillips") seeking review of the Ninth Circuit's affirmance of the decision of the United States District Court for the Central District of California granting Petrol Stops, Gas-A-Tron of Arizona, and Coinoco the same right of access to the grand jury materials received by Douglas and Phillips prior to their nolo contendere pleas to the California District Court grand jury indictments for violating the antitrust laws by engaging in the same conduct alleged by Petrol Stops, Gas-A-Tron of Arizona and Coinoco in civil antitrust actions in the United States District Court for the District of Arizona — Tucson.

OPINIONS BELOW

The March 20, 1978 opinion of the United States Court of Appeals for the Ninth Circuit is unofficially reported at 1978-1 Trade Cas. ¶61,935 (9th Cir. 1978) and appears in Appendix A hereto at pages A-1 through A-8. The May 17, 1977 Order of the United States District Court for the Central District of California (the Honorable William P. Gray presiding) appears in Appendix B hereto at pages B-1 through B-3.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether this Court should review the Ninth Circuit's decision correctly implementing the twenty year old rule, that upon demonstration of a particularized need and where the opposing party to a civil action has already been given the grand jury materials access may be granted to those grand jury materials in the sound discretion of the District Court in which the indictments were returned and nolo contendere pleas entered.

STATUTE INVOLVED

Federal Rules of Criminal Procedure, Rule 6(e) appears in Appendix C to this Brief hereto at pages C-1 through C-2.

STATEMENT OF THE CASE

This proceeding concerns the grand jury transcripts and documents obtained by attorneys in the Antitrust Division, United States Department of Justice, pursuant to subpoenas to Douglas and Phillips during the course of a criminal antitrust case — *United States v. Phillips*

Petroleum Company, et al., Crim. No. 75-377 MML (C.D. Cal. 1975). The California District Court concluded this criminal case against petitioners Douglas and Phillips by disbanding the grand jury, accepting nolo contendere pleas from Douglas and Phillips, and entering a consent decree enjoining further blatant price fixing of refined petroleum products in the western United States. The California District Court then granted respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's request for access to the same grand jury materials already made available to petitioners Douglas and Phillips, subject to a protective order limiting disclosure to Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's attorneys, prohibiting further copying, limiting the use of the evidence to impeachment, refreshing recollection, testing credibility, and requiring the return of the materials after conclusion of the private actions. Douglas and Phillips had obtained access to these grand jury materials during their criminal prosecution and nolo contendere plea process but without a similar limiting protective order. The Department of Justice had no objection to the disclosure of grand jury materials to respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco and so represented to the California District Court. Douglas and Phillips opposed the disclosure to respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco arguing that the grand jury materials were not relevant to respondents' private antitrust actions filed in Arizona in spite of the fact that Douglas and Phillips have made use of the transcripts in defending the private civil actions. Both lower courts rejected the relevancy argument of Douglas and Phillips.

A. *The Indictment and Respondents' Civil Antitrust Actions Against Douglas and Phillips*

Prior to the March 19, 1975 indictment of Douglas and Phillips for violation of the Sherman Act, 15 U.S.C. §1, Petrol Stops, Gas-A-Tron of Arizona, and Coinoco, independent marketers of refined petroleum products, filed two separate private antitrust actions in the United States District Court for the District of Arizona — Tucson against a number of major oil companies, refiners, and wholesale marketers, including Douglas and Phillips. The allegations in the two actions were similar except that one action, *Gas-A-Tron and Coinoco v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, concerned antitrust violations in Arizona and the other, *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, alleged similar violations of the antitrust laws in the three West Coast states of Washington, Oregon, and California. In their private actions, respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco claim, *inter alia*, that Phillips, Douglas, and other co-conspirator defendants had violated Sections 1 and 2 of the Sherman Act by combining and conspiring among themselves and with other co-conspirators to raise, fix, and stabilize the wholesale and retail rebrand price of gasoline sold in Washington, Oregon, California, and Arizona. In both private antitrust actions the respondents claimed that certain major oil companies, including petitioners Douglas and Phillips, had combined and conspired to eliminate competition of independent or rebrand marketers,[1] including Petrol Stops, Gas-A-Tron of Arizona, and Coinoco by combining and conspiring to artificially raise, fix or stabilize the price at which these independent marketers

[1]A rebrand marketer is a marketer who purchases gasoline from a supplier such as a Gulf, Phillips, or Douglas and resells that gasoline under its own brand or no brand or a brand other than the brand of the supplier.

purchased gasoline for resale in Washington, Oregon, California, and Arizona during at least the period of November 1969 through November 1973.

The March 19, 1975 indictment against Phillips Petroleum Company, Douglas Oil Company of California, Powerine Oil Company, Fletcher Oil & Refining Company, Golden Eagle Refining, Inc., MacMillan Ring-Free Oil Company, Inc. charged that these defendants, and various other corporations, firms, and individuals made coconspirators in the indictment, had combined and conspired, beginning at least as early as July 1970 and continuing up through 1971, to "increase, fix, stabilize, and maintain the price of rebrand gasoline" sold in Washington, Oregon, California, Nevada, and Arizona. The indictment explained that the effect of this combination and conspiracy was to raise, fix, and stabilize and maintain at artificially non-competitive levels, the price at which independent marketers were able to purchase gasoline for resale in the states of Washington, Oregon, California, Nevada, and Arizona.

The courts below found that the issues involved in the criminal case against petitioners Douglas and Phillips, *U.S. v. Phillips, supra, b*efore the grand jury and the issues in *Petrol Stops Northwest v. Continetal, supra,* and *Gas-A-Tron v. Union, supra,* are similar. (Ninth Circuit Opinion, Appendix A at pages A-2; A-7; A-8) The three cases involve the same alleged unlawful conduct in the same states during the same period of time. The California District Court went even further, as Judge Gray was willing and offered to supplement his opinion as to relevancy of the documents subpoened by the grand jury and the transcripts of the testimony of Phillips' and Douglas' employees, agents, and other individuals, by inquiring of the federal district court judges in Tucson who were pre-

siding over the *Petrol Stops Northwest v. Continental, supra,* and *Gas-A-Tron v. Union, supra,* cases in Arizona. As Judge Gray explained:

> THE COURT: I have no desire to poach on Judge Walsh's or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners (Petrol Stops, Gas-A-Tron of Arizona, and Coinoco) to have access to grand jury transcripts even though in the possession of the defendants (Douglas and Phillips), who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."
>
> I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here. (Transcript of Proceedings, March 28, 1977, Appendix B at page B-7 of Petitioners' Brief)

Petitioners Phillips and Douglas did not accept Judge Gray's offer to contact the Arizona District Court Judges to review the question of relevancy. Instead, Phillips and Douglas now impugn Judge Gray's "incentive" to spend the time and obtain additional information demonstrating that the offenses for which Douglas and Phillips were indicted and to which they plead nolo contendere are precisely the same antitrust violations, among others, described in Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's Complaints in the private Arizona actions. (Petitioners' Brief at page 12).

B. *Douglas' and Phillips' False Answers to Interrogatories and Their Employees' Contradictory Denials and Unlawful Activity*

Petitioners Douglas and Phillips filed answers to interrogatories in the Arizona civil actions that expressly contradict the findings of the grand jury and their own nolo contendere pleas, and petitioners Douglas and Phillips now seek to prevent disclosure of the impeaching grand jury materials. Douglas and Phillips argue that the California District Court Judge incorrectly concluded that these grand jury materials were relevant and necessary for Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to proceed with the Arizona civil actions with grand jury documents and transcripts indicating material misrepresentations by Douglas and Phillips. In affirming Judge Gray's decision granting limited access to the grand jury materials, the Ninth Circuit noted that further inconsistencies between the Bill of Particulars and Douglas' and Phillips' employees' recent testimony constituted an even stronger showing of relevancy and compelling necessity for Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to have the grand jury materials. Instead of addressing the substance of the conflicts between grand jury testimony and recent depositions, Douglas and Phillips attack the Ninth Circuit's concern over Douglas' and Phillips' repeated inconsistent statements under oath. (Petitioners' Brief at page 7, n. 6.)

C. *The Ninth Circuit's Opinion*

Douglas and Phillips appealed the California District Court's Order of May 17, 1977 granting Petrol Stops, Gas-A-Tron of Arizona, and Coinoco limited access to the grand jury materials already produced to Douglas and Phillips during the criminal prosecution. The Ninth Circuit reasoned that since the criminal case had been terminated by Douglas' and Phillips' nolo contendere pleas

that only one of the five reasons for grand jury secrecy remained. (Ninth Circuit Opinion, Appendix A at pages A-5 and A-6) This reason — "insuring untrammeled disclosure by future witnesses" was not a strong reason but must nevertheless be balanced against respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's need to obtain the truth in the Arizona civil actions. *Id.* After describing Judge Gray's careful balancing and his stringent protective order, the Ninth Circuit noted that to have denied Petrol Stops, Gas-A-Tron of Arizona, and Coinoco's request for disclosure "might well have been an abuse (of discretion)." (Ninth Circuit Opinion, Appendix A at page A-8.)

REASONS FOR DENYING THE WRIT

A. *The Opinion of the Ninth Circuit Court of Appeals Correctly and Consistently Applies This Court's Decisions and Subsequent Opinions by Other Circuits Granting Restricted Access to Relevant Grand Jury Material Already Produced to Opposing Parties in Civil Litigation*

The California District Court and the Ninth Circuit Court of Appeals carefully applied *United States v. Procter & Gamble*, 356 U.S. 677 (1958), and *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). (Ninth Circuit Opinion, Appendix A) In the district court Judge Gray required respondents Petrol Stops, Gas-A-Tron of Arizona, and Coinoco to demonstrate their particularized need for the grand jury materials to ferret out the facts in the Arizona antitrust actions in light of petitioners Douglas' and Phillips' perjurious answers to interrogatories and deposition testimony. This use of grand jury materials for the purpose of impeachment or refreshing recollection was recently reaffirmed by the Fifth Circuit in *Texas v. United States*

Steel Corp., 546 F.2d 626 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3238 (1977), and the Seventh Circuit in *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir. 1977), *cert. denied, sub nom. J. L. Simmons Co. v. Illinois*, 46 U.S.L.W. 3238 (1977). Granting both sides access to grand jury materials in the absence of any reason to continue secrecy had long been recognized in the Ninth Circuit, *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965), *cert. denied*, 382 U.S. 814 (1965). There are no inconsistencies among the decisions of this Court, the Circuits, and the Ninth Circuit's opinion in this case, which Douglas and Phillips now seek to overturn. Douglas' and Phillips' unsupported assertions of inconsistency between the Fifth Circuit and the Seventh Circuit ignore the holdings of these courts and that this Court considered both the *Texas* and *Sarbaugh* cases simultaneously and denied the petitions for writs of certiorari in both cases on the same day.

B. *There is no Important Question of Law Presented by the Petition for Writ of Certiorari*

No significant question requiring this Court's attention exists. Disclosure of grand jury materials pursuant to Federal Rules of Criminal Procedure, Rule 6(e) has long been left to the sound discretion of the federal district court judge. The careful exercise of that discretion by Judge Gray is apparent from reading the interlineated Order of May 17, 1977 and the Transcript of Proceedings of March 28, 1977. The Ninth Circuit analyzed Judge Gray's discretionary decision in the context of this Court's opinions and other courts' decisions. This Court should not review Judge Gray's discretion in granting respondents' request for limited access to grand jury documents and transcripts. The Ninth Circuit Court of Appeals has

already carefully performed this appellate review function. The law applied to the unique facts of this case by the Ninth Circuit Court's opinion follows the other Circuits and the rules of law established by this Court.

CONCLUSION

For the foregoing reasons respondents Petrol Stops, Gas-A-Tron of Ariozna and Coinoco respectfully submit that the Petition for a Writ of Certiorari in this case should be denied.

DATED this 26th day of May, 1978.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2305
OPINION

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, AND COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, PHILLIPS PETROLEUM COMPANY,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company,* 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests. After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggest no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery

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[1]There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute. It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with the subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

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[2]Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J. L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

We previously applied the Supreme Court's standards in *U.S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information,

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[3]The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commisison of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Cor-porate witnesses are vulnerable to their corporate employers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for inpeachment as sufficient. *SEC. v. National Student Marketing,* 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harper & Row Publishers, Inc.,* 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient *Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc., v Globe Ticket Co.,* 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra,* recently held that a grant of acsess with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce,* 323 F.2d 233,

238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh,* 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J. L. Simmons Co. v. Illinois,* 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might

[4]We think that the Central District of California court was the proper district court to consider the issue. It was best situtaed to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh,* 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5]In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not see the materials merely for a general fishing expendition. It made a sufficient showing of particularized need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORDER
Miscellaneous
No. 5706

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S. v. Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorary William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders and adjduges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al. v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or

in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4th day of May, 1977.

William P. Gray
United States District Judge

STATUTE INVOLVED

Federal Rules of Criminal Procedure, Rule 6(e):

(1) *General rule.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to:

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which such disclosure has been made.

was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) *Sealed indictments.* The Federal magistrate to who an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

PROOF OF SERVICE
(by mail)

I am a citizen of the United States and a resident of the City of Salt Lake City and Salt Lake County, the State of Utah. I am over the age of eighteen years and not a party to the within action. My business address is 500 Kearns Building, Salt Lake City, Utah 84101.

On May 26, 1978, I served the above Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on interested parties in this action by placing three true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Salt Lake City, Utah, address as follows:

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I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 26, 1978, at Salt Lake City, Utah.

Gordon Strachan

ACKNOWLEDGEMENT CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On this 26th day of May, A.D. 1978, before me, Ann Molen, a Notary Public in and for said County and State, personally appeared Gordon Strachan known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Ann Molen
Notary Public in and for said County and State

No. 77-1547

In the Supreme Court of the United States

OCTOBER TERM, 1977

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, COINOCO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, COINOCO, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 571 F. 2d 1127. The order of the district court (App. 1a-3a)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The petition for a writ of certiorari was filed on April 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition.

QUESTIONS PRESENTED

1. Whether the district court in which a grand jury was impaneled is authorized to make a limited disclosure of grand jury materials for use in a private antitrust case pending in another district.

2. Whether the district court abused its discretion when it authorized disclosure of grand jury materials based on a showing of particularized need for the limited purposes of impeachment or refreshing recollection of witnesses.

STATEMENT

In March 1975 a grand jury in the Central District of California indicted Douglas Oil Company of California (Douglas) and Phillips Petroleum Company (Phillips) for price fixing of rebrand gasoline.[2] The district court accepted pleas of *nolo contendere* by Douglas and Phillips in December 1975 and the criminal action was terminated (Pet. App. A1-A2). *United States* v. *Phillips Petroleum*, C.D. Cal., No. 75-377-MML.

In December 1976, Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco (collectively "Petrol Stops") filed a petition in the District Court for the Central District of California seeking production of all grand jury transcripts made available to Phillips and Douglas during the criminal proceedings and all documents produced by Phillips and Douglas which were subpoenaed by the grand jury (Pet. App. A2). Petrol

[2]"Rebrand gasoline" was defined in the indictment as gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner (see Pet. 5 n. 4).

Stops sought to use the materials in private antitrust cases it had begun in the District of Arizona in 1973 (Pet. App. 2a).[3]

After holding a hearing (Pet. App. B1-B15), the district court authorized Petrol Stops to inspect and copy transcripts of grand jury testimony and documents produced by Phillips and Douglas (App. 1a). It limited disclosure to counsel for Petroi Stops in the pending Arizona antitrust cases (App. 2a-3a) and further limited the use of the grand jury material "solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial" (App. 2a).

The court of appeals unanimously affirmed (Pet. App. A1-A8). It found that the indictment charged antitrust violations similar to those alleged in the private actions (Pet. App. A1-A2), and held that the district court's "carefully limited disclosure" comported with prevailing case law and was not an abuse of discretion (Pet. App. A4-A8).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. Petitioners' primary contention, that the district court in which the civil antitrust action is pending must determine the merits of disclosure (Pet. 8-10), is insubstantial.

[3]The private cases alleged that Douglas, Phillips and others had fixed prices and restricted access to gasoline in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2. *Petrol Stops Northwest* v. *Continental Oil Company*, D. Ariz., Civ. No. 73-212 TUC-JAW; *Gas-A-Tron of Arizona* v. *Union Oil Company*, D. Ariz., Civ. No. 73-191 TUC-WCF.

To the extent that petitioners argue for a flat rule that would oust the district court in which the grand jury was convened from any authority to decide the merits of disclosure of the grand jury material, their argument is plainly unsound. Rule 6(e) of the Federal Rules of Criminal Procedure contemplates such disclosure. Extensive precedent supports it. *State of Illinois* v. *Sarbaugh*, 552 F. 2d 768 (C.A. 7), certiorari denied *sub nom. J.L. Simmons Co., Inc.* v. *State of Illinois* No. 76-1661, October 11, 1977; *Gibson* v. *United States*, 403 F. 2d 166 (C.A. D.C.); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 21 F.R.D. 233 (D. D.C.). Significantly, petitioners cite no authority for their proposition, which would work an unprecedented and unwarranted restriction on the authority and discretion of district courts.

To the extent that petitioners simply argue that the district court on the facts of the present case abused its discretion in deciding the disclosure question rather than transferring the matter to the district court in Arizona, it is sufficient to state that the court of appeals resolved the issue against petitioners, and that it is not appropriate for review here.

2. Contrary to petitioners' assertions (Pet. 11-14), the decision below does not conflict with this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, or with the decision of any other court of appeals. In *Proctor & Gamble* the Court stated that a party seeking discovery of grand jury testimony "to impeach a witness, to refresh his recollection, to test his credibility and the like" may obtain it upon a showing of "particularized need." *Id.* at 683. In the present case the district court authorized disclosure of grand jury transcripts "solely for the purpose of impeaching or refreshing the recollection of a witness" (App. -a). The court of appeals properly held that Petrol Stops had established particularized need

for this discrete and limited disclosure by its showing of possible contradictions between answers Douglas and Phillips made to interrogatories in the private suits and the charges in the indictment to which they pleaded *nolo contendere* (Pet. App. A7).[4] Petitioner's contention that there was no showing of particularized need, or even relevance, because of the differences between the indictment and the private antitrust complaints (Pet. 12-13) is a factual issue resolved against them below (Pet. App. A2).

Similarly, there is no conflict between the instant decision and those of other circuits. In the present case, as in *State of Illinois* v. *Sarbaugh, supra,* and *United States* v. *Alton Box Board Co.*, C.A. 7, No. 77-1697 decided December 1, 1977, petition for a writ of certiorari pending, No. 77-1390, the court deemed the showing of particularized need to be satisfied by plaintiffs' need to prepare for witness examination at deposition or trial. In arguing (Pet. 13-14) that there is a conflict between these decisions and *State of Texas* v. *United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), certiorari denied, No. 76-1710 October 11, 1977, petitioners ignore a critical distinction. *State of Texas* held only that disclosure during the criminal proceedings to a corporate defendant of its employee's testimony was not in itself sufficient to show particularized need warranting further disclosure in a civil suit. Nothing in the *State of Texas* decision indicates that if the additional factor of preparing for witness examination had been present disclosure would have been denied.

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[4]The court of appeals also found that Petrol Stops had pointed out on appeal "inconsistencies between the government's bill of particulars and statements made in recent depositions" (Pet. App. A7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1978.

DOJ-1978-06

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, ET AL.,

PETITIONERS,

VS.

UNITED STATES OF AMERICA,

RESPONDENT,

DOUGLAS OIL COMPANY OF CALIFORNIA, ET AL.,

REAL PARTIES IN INTEREST.

ORDER

Miscellaneous

No. 5706

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S.* v. *Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorable William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders and adjudges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and

copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the indictment in *United States* v. *Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States* v. *Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al.* v. *Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest* v. *Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of

the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4 day of May, 1977.

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United States District Judge

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

OPENING BRIEF FOR THE PETITIONERS

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OPENING BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 571 F.2d 1127 and reprinted in the Appendix at pages 1 *et seq.* The district court did not issue a memorandum opinion. The Reporter's Transcript of Proceedings before the district court appears on pages 50-65 of the Appendix and the order issued by that court is reproduced on pages 48 and 49 of the Appendix. (References to the Appendix will hereinafter be noted as "A__".)

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The Petition for Writ of Certiorari was filed on April 27, 1978, and was granted on June 19, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals for the Ninth Circuit held below that it was proper for a district court having jurisdiction over grand jury transcripts in the possession of the government to rule that private, civil plaintiffs demonstrated a sufficient compelling need for those transcripts and were entitled to inspect and copy them where: (a) the civil actions, for which the transcripts were sought, were pending in a foreign district court; (b) the defendants in those civil actions had copies of all of the transcripts sought by the plaintiffs; (c) the district judge ordering disclosure was not familiar with either the earlier grand jury proceedings or the pending civil actions; and (d) the district judge did not require a definite showing of relevancy of the transcripts to the subject matter of the civil actions. The questions presented are:

1. Whether the plaintiffs in a civil action have made the required particularized showing of compelling necessity for disclosure of entire grand jury transcripts merely by showing that several defendants pleaded *nolo contendere* to an antitrust indictment returned over one year after the civil action was filed when the conspiracy alleged in the indictment is not the same conspiracy as that alleged in the civil action and where the matters considered by the grand jury are not shown to be relevant to the civil action.

2. Whether the district court in which the civil action is pending — the court familiar with the lawsuit and charged with responsibility for its administration — is the proper court to determine issues of relevancy and "particularized need" when secret grand jury transcripts are sought, rather than the judge of a foreign district court who is unfamiliar with both the civil action for which the transcripts are sought and the criminal action which was brought as a result of the grand jury proceedings.

STATUTE INVOLVED

Rule 6(e), Federal Rules of Criminal Procedure:

Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any jurors may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.[1]

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[1] Both the Petition for Writ of Certiorari and Respondent's Brief in Opposition to the Petition inaccurately cited the latest revision of Rule 6(e) as the "Statute Involved" in this case. Rule 6(e) was amended by order of this Court on April 26, 1976, and Congress modified and adopted the amendment in the following year. The amendment did not become effective until October 1, 1977. *See* note 33, *infra*. The civil plaintiffs filed their "Petition for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Produced Pursuant to the Grand Jury Subpoena" on December 15, 1976, prior to the effective date of the amendment. (A. iii) Although the prior version of the rule is to be construed, the meaning of the relevant part of the revised Rule 6(e) was not changed. *See* 123 Cong. Rec. H7867 (daily ed. July 27, 1977) (remarks of Rep. Mann).

STATEMENT OF THE CASE

In 1973, two separate antitrust actions were filed in the United States District Court, District of Arizona — one by respondent Petrol Stops Northwest[2] and the other by respondents Gas-A-Tron of Arizona and Coinoco[3] — against a number of gasoline refiners and wholesalers.[4] (A. 129-147, 148-167) Phillips Petroleum Company ("Phillips") was named as a defendant in both lawsuits and Douglas Oil Company of California ("Douglas") was named only in the former action.[5]

On March 17, 1975, *over one year after* the Arizona civil complaints were filed, a grand jury indictment was returned in the United States District Court, Central District of California, charging Phillips, Douglas and four other corporate defendants with a conspiracy to fix

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[2] *Petrol Stops Northwest v. Continental Oil Company, Douglas Oil Company, Gulf Oil Company, Shell Oil Company, Exxon Corporation, Mobil Oil Corporation, Union Oil Company of California, Amoco Oil Company, Standard Oil Company of California, Standard Oil Company of Indiana, Phillips Petroleum Company, and Armour Oil Company,* Civil No. 73-212-TUC-JAW (D. Ariz.).

[3] *Gas-A-Tron of Arizona and Coinoco v. Union Oil of California, Amoco Oil Company, Standard Oil Company of Indiana, Shell Oil Company, Mobil Oil Corporation, Standard Oil Company of California, Phillips Petroleum Company, Exxon Corporation, and Diamond Shamrock,* Civil No. 73-191-TUC-WCF (D. Ariz.).

[4] For convenience respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco will hereinafter be referred to collectively as "Petrol Stops". Respondents were related partnerships engaged in the retail distribution of gasoline at service stations owned, leased or operated by respondents individually or in conjunction with others. Petrol Stops Northwest had stations in eight states in the West and Midwest; Gas-A-Tron of Arizona and Coinoco operated primarily in Tucson, Arizona. (A. 130 and 149)

[5] The United States District Court, District of Arizona, will hereinafter be referred to as the "Arizona court" and the civil suits filed by Petrol Stops will hereinafter be referred to as the "Arizona actions".

the price of "rebrand gasoline".[6] (A. 118-122) *None* of the defendants named in the grand jury indictment, other than Douglas and Phillips, were involved in either Arizona action. *None* of the refiners and wholesalers named in the Arizona actions, except Douglas and Phillips, were named in the indictment.[7]

In October of 1976, pursuant to Rule 34 of the Federal Rules of Civil Procedure, Petrol Stops filed and served in the Arizona actions a request for production of all of the grand jury documents and transcripts in the possession of Douglas and Phillips.[8] Douglas and Phillips objected to the production of those items on relevancy and related grounds. Rather than move for an order compelling discovery in the Arizona court, Petrol Stops instead went to California and filed a petition for production of the grand jury material in the United States District Court, Central District of California, a court wholly unfamiliar with the underlying civil actions.[9] (A. 114-117) The petition sought the disclosure of the same documents and transcripts which had been the subject of Petrol Stops' Rule 34 request in the Arizona actions; copies of those grand jury materials were also

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[6] The indictment defined "rebrand gasoline" as "gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner". (A. 118) The defendants in the indictment included Douglas, Phillips, MacMillan Ring-Free Oil Company, Powerine Oil Company, Golden Eagle Refining Company and Fletcher Oil & Refining Company. (A. 118-120)

[7] In addition to the indictment, a civil complaint was filed simultaneously by the government against the six defendants named in the indictment. (A. 123) The indictment resulted in the entry of a plea of *nolo contendere* by each defendant, and the civil complaint resulted in the entry of a consent judgment against each defendant.

[8] Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury.

[9] The United States District Court, Central District of California will hereinafter be referred to as the "California court".

in the possession of the Antitrust Division of the United States Department of Justice in Los Angeles ("Antitrust Division").

The Antitrust Division did not object to the disclosure, but suggested that Douglas and Phillips be afforded the right to be heard. (A. 99-100) Douglas and Phillips appeared as real parties in interest and opposed the petition, arguing that Phillips and Douglas had copies of the documents and transcripts sought by Petrol Stops, that Petrol Stops had not made a sufficient showing of particularized need to warrant disclosure of secret grand jury transcripts, that the Arizona court was the proper court to determine relevancy and need, and that Petrol Stops ought not to be permitted to "forum shop". (A. 90-98) In support of its petition, Petrol Stops made a single offering to demonstrate its "particularized need" for the production of the grand jury materials, namely that Douglas and Phillips had stated in response to one of Petrol Stops' interrogatories that they were unaware of any conversations or communications with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. (A. 103-104) Although the indictment involved a different group of defendants and was not shown to involve the same sphere of business as the Arizona lawsuits, Petrol Stops nevertheless argued that since Douglas and Phillips had pleaded *nolo contendere* in the criminal action, all transcripts and documents generated and produced before the grand jury would be useful in assisting discovery and in impeaching that single interrogatory response.

At the hearing on the petition, the district judge admitted that he had not been involved with the grand jury proceeding[10] and that he had "no information about the

[10] Judge Malcolm Lucas presided over the criminal proceedings. Judge Harry Pregerson presided over the civil proceedings brought by the government. Judge William P. Gray heard Petrol Stops' Petition for Production.

considerations of problems that the grand jury had when they considered this matter . . . ." (A. 53) In his comments, the district judge indicated that he had no firm foundation for a belief that the requested grand jury material would be relevant to the Arizona lawsuits, and added that he did not think that relevancy was even important to the question of disclosure involved. (A. 57)

The district judge entered an order granting Petrol Stops' production request with certain limitations on use of the materials. (A. 48-49) Douglas and Phillips sought and obtained a stay of the order pending appeal to the Court of Appeals for the Ninth Circuit. On March 20, 1978, the court of appeals affirmed the order of the district court finding that Petrol Stops had demonstrated a particularized need by showing that "some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment."[11] (A. 7) A stay of mandate of the decision of the court of appeals was obtained pending application for writ of certiorari from this Court. The Arizona actions are still pending.

SUMMARY OF ARGUMENT

If the policy of grand jury secrecy is to retain any vitality, the standard established by this Court to regulate the disclosure of grand jury matters to civil

[11] On October 31, 1977, Petrol Stops had moved to supplement the appellate record with two affidavits and unfinished and unsigned deposition testimony from its civil case that purportedly showed additional need. (A. 22-47) None of those materials had been presented to the district court when it ruled upon the Petrol Stops petition. The court of appeals (per Judge Hufstedler) denied the motion on Dec. 5, 1977, but added that "... the materials in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper." (A. 9) Thus, materials that were *never* before the district court nevertheless found their way into the appellate opinion. "On appeal Petrol Stops make a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions." (A. 7) The bill of particulars was likewise never before the district court or included in Petrol Stops' motion to supplement but merely quoted in part, without prior notice or approval of any court, in their appellate brief.

litigants must be observed and procedures must exist to insure that that standard is observed. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), this Court enunciated the standard against which all subsequent requests by civil litigants for grand jury materials have been measured, *i.e.*, that the " 'indispensable secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh countervailing policy. But they must be shown with particularity." *Id.* at 682. The secrecy of grand jury proceedings must always prevail in the absence of a particular, compelling need. This standard was predicated on sound reasoning which today is no less compelling than it was twenty years ago. However, some lower courts have failed to follow this Court's pronouncement and the standard of compelling necessity has been largely eroded. The decision of the Ninth Circuit Court of Appeals below represents the most radical departure from that standard to date. The district court was held not to have abused its discretion in ordering production of entire grand jury transcripts even though it: (1) did not require a showing of particularized need as mandated by this Court in *Procter & Gamble*, (2) erroneously held that no important reasons for the continued secrecy of the grand jury transcripts would exist once the criminal proceeding had ended and the defendants therein had obtained copies of the grand jury materials, and (3) ordered the wholesale production of grand jury materials without ever determining whether any portion of those materials would be relevant either specifically for purposes of impeachment or generally to the Arizona actions.

Both the district court and the court of appeals below have erred in holding that little or no need is required for disclosure once the criminal case has been concluded. To the contrary, substantial reasons for the continued

secrecy of the materials exist, especially in the context of an antitrust grand jury investigation. The policy and practical reasons for continued secrecy are simply too important to ignore, as the courts did below.

The failure of the district court to apply properly the "compelling necessity" standard resulted in large part from its inability to do so. That task requires a court to weigh two independent determinations. A court must first identify the reasons which require the continued secrecy of the grand jury testimony and then must determine the specific need of the civil litigant for that testimony. Once done, that court must weigh those two competing interests to determine whether disclosure is warranted.

In the instant case, a judge unfamiliar with both the grand jury proceedings and the civil actions for which the materials were sought was called upon to weigh those competing interests. In situations such as this, where grand jury testimony is sought for a civil action in a district court other than the one in which the grand jury sat, a procedure must be observed whereby the court having the information required for a determination of compelling necessity participates in that decision.

The court in which the civil suit is pending is generally the court best able to resolve all the preliminary issues required for a determination that a compelling necessity exists which warrants disclosure of grand jury testimony. Only that court can be expected to answer the questions which must be addressed to determine whether there is a legitimate, particularized need for the testimony. Are the materials sought relevant to the subject matter of the civil action? Is the information sought necessary to any claim or defense of the party seeking disclosure in the civil action? Can the needed testimony be obtained elsewhere through other civil discovery means? Is it appropriate to order production of such material at *this* stage of civil litigation? Similarly, that court will be as well

equipped as any other to identify and evaluate the reasons for continued grand jury secrecy once the criminal proceedings have been concluded. That latter determination largely involves general issues of policy rather than specific facts. The court in which the civil suit is pending is, therefore, the court best suited to decide whether the disclosure of grand jury testimony is actually warranted.

A number of procedures were available to the district court below, any of which would have properly placed the determination of compelling necessity before the court in which the civil suits are pending. The California court could have denied Petrol Stops' petition and instructed them to seek a discovery ruling compelling production from the court in which their cases were pending. Alternatively, the California court could have initially determined the extent of the need for continued secrecy and, if the need was less than absolute, could have made the grand jury transcripts in the possession of the government available to the Arizona court in order for that court to determine whether, in either of the lawsuits before it, a compelling need for disclosure existed. Instead, the district court judge, who admittedly was unfamiliar with both the grand jury proceeding and the underlying civil actions for which the testimony was sought, refused to adopt available and suggested procedures which would have insured that the court best able to decide the issue of particularized need would be the one to make that determination.[12]

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[12] Douglas proposed to the California court, in its Memorandum in Opposition to Petrol Stops' Petition for Production (A. 90-95), a procedure which would have permitted the Arizona court to determine the issues of relevancy and particularized need. An erroneous statement in the opinion of the Ninth Circuit below might lead one to believe that those issues had been presented to the Arizona court, but that the Arizona court had declined to rule on them. "The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy." *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130, n.4 (9th Cir. 1978). (A. 7) That statement is simply incorrect and is not supported by the record; for while Petrol Stops requested the grand jury material from Douglas and Phillips under Rule 34, Federal Rules of Civil Procedure, it did not file a motion under Rule 37, Federal Rules of Civil Procedure, to compel production. The Arizona court, therefore, had not been called upon to decide the issue.

ARGUMENT

I

A CIVIL LITIGANT MUST DEMONSTRATE A COMPELLING NECESSITY FOR SPECIFIC GRAND JURY MATERIALS BEFORE DISCLOSURE IS PROPER

A. Substantial Reasons Which Require That Grand Jury Materials Not Be Disclosed Continue To Exist After The Criminal Proceedings Have Ended

The grand jury as a public institution serving the community might suffer if those testifying today know that the secrecy of their testimony would be lifted tomorrow. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

The concern expressed by Mr. Justice Douglas for this Court was properly founded on the fact that testimony before a grand jury will neither be as candid nor as extensive if a witness knows that his testimony will not remain secret.[13] This concern has special applicability to antitrust investigations.

The ability of a grand jury to ferret out antitrust violations must necessarily suffer where those testifying know that their testimony will not be kept secret. A witness who is questioned about the business practices of himself and others will fear some form of retaliation and will be discouraged from testifying fully. In an antitrust investigation this fear of retaliation relates not only to the witness' own employer, but also to other companies

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[13] In addition to encouraging open and frank disclosures by grand jury witnesses, four other reasons have traditionally been ad-

in the same industry whose activities he has called into question.[14] An antitrust investigation normally examines the business practices of many firms in an industry. A witness before a grand jury is questioned as to his conduct, that of fellow employees, and the conduct of other firms and their employees. In many cases he will be called upon to testify about customers, suppliers, and other individuals and firms with whom he deals in arms length, business transactions. These are the very people upon whom his business and his opportunities for advancement depend. Additionally, these are the people who represent the only alternative employers to a witness who has long worked in a single industry. One cannot expect a grand jury witness who knows his testimony will not remain secret to testify as fully as one who is assured of its secrecy. Facts that might be recalled may never be developed. Leads that might be suggested may never come to light.

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vanced to justify grand jury secrecy. As summarized in *United States v. Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954), and cited by this court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958), the five reasons are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

[14] Traditionally, the fear of retaliation has focused only upon action by the witness' employer. This view fails to account for both the manner in which grand juries function and the realities of a business environment. Possible retaliation is not and never has been confined to the corporate employer, nor is it perceived by a witness to be confined to the employer. Retaliation by other members of the business community in which the witness must work is often more pernicious.

Where a civil litigant seeks disclosure of grand jury testimony, the policy concern of encouraging the unfettered flow of information to the grand jury is not the only existing reason for grand jury secrecy. Whenever a courts orders the production of the *entire text* of a grand jury transcript to a civil litigant, another traditional reason for grand jury secrecy is endangered — the need to protect the innocent accused from disclosure of the fact that he was under investigation. The transcript of a grand jury witness will inevitably contain information about individuals and firms other than himself and his employer. In a grand jury investigation, the rules of evidence are suspended; a witness may be asked to testify as to hearsay, suspicion, and his personal deductions and opinions without regard to the probative value of his testimony in a later trial. The witness may reveal information and opinions about individuals and firms that are never indicted. Additionally, the content of answers by other, earlier witnesses about firms and individuals not later indicted can be expected to surface in questions asked of this witness by the prosecuting attorney. When the entire text of a grand jury transcript is disclosed to a civil litigant, the names of innocent individuals and all the acts they may have been suspected of, but which the evidence was not sufficient to indict them for, are disclosed.

This is particularly true of grand juries which are investigating possible antitrust violations. This type of grand jury, unlike many other types of federal grand juries, generally investigates in a broad, wide-reaching manner. Evidence will be received that could relate to many possible violations of the antitrust laws. When a narrow indictment issues, such as the rebrand gasoline indictment involved in this case, wholesale production of grand jury materials reveals all of the alleged improper activities and the individuals suspected of participating in those activities, even though there was insuf-

ficient evidence to justify an indictment on any of those activities. This policy of protecting the innocent by maintaining the secrecy of grand jury materials applies to all of those persons or acts as to which the grand jury found no probable cause to believe that a crime had been committed. Thus, the policy of protecting the "innocent accused" continues to exist well after any specific narrow indictment has been brought.

The protection which fairness requires be accorded to the innocent accused also extends to individuals and firms who are indicted. Where a grand jury conducts a broad investigation into many areas, the acts which indicted individuals were suspected of doing, but for which they were not indicted, should remain undisclosed. Indicted individuals remain "innocent accused" with regard to all matters for which there was no evidence or finding of wrongdoing. The publication of the entire text of grand jury transcripts results in the disclosure of all the acts these parties were merely suspected of doing.

The disclosure of entire texts of grand jury transcripts may have the additional, unfortunate result of impinging upon the activities of grand jurors themselves.[15] Grand jurors often take a very active part in the proceedings; they ask questions, make comments, are allowed to share their own experiences and backgrounds, and are not burdened by strict evidentiary rules in their questions and deliberations. A grand juror who knows that the "sanctuary" of the grand jury may not remain sacrosanct and that the extent and substance of his participation may become widely known may not participate as fully as he would otherwise. As noted by this Court in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959):

[15] The second of the five policy reasons historically advanced in support of the need for grand jury secrecy is the need to insure the utmost freedom to the grand jury in its deliberations. *See* note 13, *supra*.

> [Grand jury] indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. . . . To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. *Id.* at 400.

All these reasons require that grand jury materials remain secret even after all criminal proceedings have ended. But petitioners do not contend that in all cases requests for grand jury materials should be denied. Other policy reasons require that the shroud of secrecy not remain absolute, but be discretely lifted. Civil litigants aid the government in the enforcement of the antitrust laws; disclosure of grand jury materials to civil litigants in select situations might aid that enforcement function. What then is the "right" amount of disclosure of grand jury materials after the criminal proceedings have ended? How does one fashion a rule which adequately protects the grand jury process and individuals affected by that process and concomitantly aids civil litigants?

B. The Standard Established By This Court Permits Selective Disclosure Of Grand Jury Materials Only After A Showing Of "Compelling Necessity"

The single rule which promotes and protects the public interests affected whenever grand jury materials are sought by a civil litigant was articulated by this Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). This Court properly held that a civil litigant must demonstrate a compelling necessity for specified grand jury materials before disclosure is proper. A compelling necessity could only exist where the demonstrated "particularized need" of the civil litigant outweighed the reasons for the continued secrecy of the materials sought. By requiring that a need be shown for *specific* testimony, this Court insured that the identity of unindicted parties and unsupported allegations would not be disclosed unnecessarily; by requiring that a party seeking disclosure demonstrate that the information sought could not be attained through other means, this Court insured that the secrecy of grand jury proceedings which encourages individuals to testify freely and openly before it would not be breached needlessly; and by permitting a party seeking disclosure to gain access to specific grand jury materials if the materials were necessary to his claim, this Court protected the legitimate needs of civil litigants. This Court's decision in *Procter & Gamble* provided the only standard of disclosure which could adequately protect all competing public and private interests when grand jury materials are sought.

In *Procter & Gamble*, the criminal proceedings had terminated without an indictment and the government had filed a civil antitrust suit against the defendants. The government was using the grand jury transcripts to prepare for the civil case and the defendants in that suit sought to do the same. In *United States v. Procter & Gamble Co.*, 19 F.R.D. 122 (D.N.J. 1956), the district

court granted the motion seeking discovery, ruling that defendants had shown "good cause" as then required by Rule 34. The good cause showing rested on the ground that the government was using the transcript in preparation for trial, that it would be useful to the defendants in their preparation for trial, and that only in this way could the defendants get the desired information. These reasons, the district court concluded, outweighed the reasons behind the policy for maintaining the secrecy of the grand jury proceedings. *Id.* at 128. The district court entered an order directing the government to produce all the transcripts and to permit defendants to inspect and copy them. As the government persisted in its refusal to disclose the grand jury transcripts, the district court entered judgment of dismissal and the government appealed.

In reversing the district court's order requiring disclosure of the grand jury transcripts, this Court prescribed guidelines for trial judges to follow when ruling on requests for the production of secret grand jury materials.

This "indispensable secrecy of grand jury proceedings," *United States v. Johnson, supra,* (319 U.S. at 513), must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.

No such showing was made here. The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice

would be done. *United States v. Procter & Gamble Co., supra,* 356 U.S. at 682.

This Court thereby articulated a balancing test for the determination of whether to disclose grand jury materials, that test required that the "particularized need" for disclosure be weighed against the existing reasons for grand jury secrecy. A mere showing that materials were needed to avoid the delay and expense of procuring the same information through civil discovery techniques was expressly rejected as being insufficient to constitute a showing of compelling necessity. Much more was required. This Court prescribed the constituent elements necessary to any showing of "particularized need". As a minimum showing of particularized need, a trial judge must require:

1. That the relevancy and usefulness of the testimony be sufficiently established; and

2. That *proof* be required that without the transcript a defense would be greatly prejudiced, or without reference to it an injustice would be done. *Id.* at 682.

This Court went on to explain its requirement for particularity and the confining of disclosure to the limits of the need shown:

> We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, or to test his credibility, and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly. We only hold that no compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34. We hold that a much more particularized, more discreet showing of need is necessary to establish "good cause." *The court made no such particularized finding of need in case of any one witness.* *Id.* at 683. (Emphasis in last sentence added.)

Therefore, an essential requirement is that the need shown by the seeking party must in fact be *particularized, e.g.,* that a need exists for specific grand jury testimony to impeach a specific witness' credibility or the like. Where such specific requests for identified uses and purposes have not been made, a particularized need sufficient to outweigh the continued reasons for grand jury secrecy cannot exist and there can be no compelling necessity for the production of secret grand jury testimony.

C. The "Slight Need" Standard Utilized By The Lower Courts Herein Is Contrary To The "Compelling Necessity" Standard Established By This Court

The court of appeals in upholding the district court's discovery order below utilized a "slight need" standard, which does not require that the seeking party make a showing of *compelling* necessity. As stated in the court of appeal's opinion: "The district court recognized that some particularized need was necessary but that it did not have to be great." *Petrol Stops Northwest v. United States,* 571 F.2d 1127, 1131 (9th Cir. 1978). In this case, the Ninth Circuit required little more than a showing that the material sought might be useful. The erroneous standard utilized by the Ninth Circuit is in direct conflict with this Court's standard in *Procter & Gamble,* principally because it lacks a threshold level of necessity for the release of grand jury materials. Thus, the secrecy of grand jury proceedings was permitted to be broken not after a showing of a "compelling necessity" (this Court's standard) but rather where the particularized need was not shown to be significant or urgent.

The circuit courts which have considered the issue of the appropriate standard to be applied have reached

conflicting results. On the one hand, the Fifth Circuit has followed this Court's pronouncement, stating that a primary reason for grand jury secrecy is "to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need . . . [footnote omitted.]" *State of Texas v. United States Steel Corp.*, 546 F.2d 626, 629 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977). In that case, corporate defendants in a civil antitrust suit filed an interlocutory appeal from the trial court's order to surrender grand jury transcripts which each defendant had previously obtained pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The defendants had subsequently pleaded *nolo contendere* to the indictment and the same alleged conduct formed the basis of both the criminal case and the state's civil case. The Fifth Circuit rejected the state's argument that the facts of the case dispelled any reason for continued secrecy and that it should not be obligated to demonstrate particularized need. Instead, the Fifth Circuit adhered to the strict standard of *Procter & Gamble* and held that disclosure of grand jury transcripts could not be proper without an affirmative showing of compelling necessity. *Cf., Baker v. United States Steel Corp.*, 492 F.2d 1074, 1079 (2nd Cir. 1974) (where the Second Circuit indicated its disapproval of a standard of "slight need" in this context). Conversely, both the Ninth Circuit, in the present case, and the Seventh Circuit, in *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775-777 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977), have permitted access to grand jury transcripts on a showing of need which was admitted to be less than a "compelling necessity".

This Court has always required disclosures of secret grand jury materials to be justified by a specific positive demonstration of compelling need. *E.g., Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass*

Company v. United States, 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). The "slight need" standard which fails to afford sufficient weight to the "indispensable secrecy of grand jury proceedings" is clearly contrary to this Court's previous decisions.

II

THE DISTRICT COURT BELOW ABUSED ITS DISCRETION BY IMPROPERLY DIRECTING THAT GRAND JURY TRANSCRIPTS BE RELEASED TO THE RESPONDENTS

A. The District Court Did Not Require A Minimum Showing Of Particularized Need As Required By This Court

The district court in the instant case did not require Petrol Stops to make any showing of particularized need in order to satisfy the "compelling necessity" standard of *Procter & Gamble*. No showing was made that the testimony sought was relevant and no proof was offered that without the testimony Petrol Stops would be greatly prejudiced. To the extent there was any attempt to show a need for the transcripts, the need was generalized, not particularized.

The district court never required or solicited a sufficient showing of relevance. The district court was advised by counsel for Douglas and Phillips: (1) that the scope of discovery was to be a hotly-contested issue in the district court in Arizona, (2) that the Arizona District Court, which had a greater familiarity with the cases, had yet to rule on the scope of discovery in the lawsuits before it, and (3) that the participation of the Arizona court was necessary for a proper resolution of the issue. An excerpt from the transcript of the hearing before the district court judge is indicative of the failure of that court to

sufficiently establish the relevancy of the requested documents:

> MR. THURSTON (counsel for Douglas): Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to make that decision.
>
> THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. *I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?* (Emphasis added.) Reporter's Transcript of Proceedings of March 28, 1977. (A. 56-57)

(One answer to the district court's inquiry is that this Court in *Procter & Gamble* required that the relevancy and usefulness of the testimony be sufficiently established prior to any release of secret grand jury materials.)

At the hearing before the district court, Douglas and Phillips argued that the requested grand jury materials were not even relevant to Petrol Stops' lawsuit. The district judge apparently satisfied himself that they were relevant merely by asking *counsel for Petrol Stops* whether he believed they were.[16] This approach is

[16] At the hearing on their Petition for Production, Petrol Stops represented to the district court: "Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers." (A. 58) However, the indictment, in three charging paragraphs, charged a conspiracy to fix, stabilize and maintain the price of "rebrand gasoline". (A. 121) *None* of the fifty-six charging paragraphs in the two civil complaints mentions rebrand gasoline", (A. 129-167) and the defendants in the civil actions are different from those pleading *nolo contendere* to the government case except for Douglas and Phillips.

especially egregious because the district court judge had already expressed his unfamiliarity with both the grand jury proceedings and the civil actions in Arizona. (A. 55-57) The establishment of particularized need as required by this Court is not met merely by ascertaining that the party seeking disclosure *believes* that the information may be relevant. (A. 58-59) This is particularly true here where the district court was aware that the civil actions did not follow the government's case and differed from the latter both as to parties and subject matter. (A. 58-60) Because this Court has mandated that a "particularized finding of need" must precede the release of grand jury transcripts, it is beyond the permissible discretion of the district court to order the production of the transcripts without sufficient scrutiny of the very facts in the case which will demonstrate the existence or non-existence of particularized need.

The district court judge based his decision on relevance simply on the fact that the civil suits in Arizona and the grand jury proceeding in Los Angeles both concerned alleged antitrust improprieties. The word "antitrust" is the skin for many different thoughts and a multitude of potential sins. Something more than reference to the fact that Petrol Stops' lawsuits are "antitrust" actions and that the indictment returned against the six corporate defendants concerned "antitrust" violations is necessary for a showing of relevance. If the subject matter of this lawsuit was an alleged attempt by an oil company to force a service station dealer to buy company sponsored tires, batteries and accessories, a grand jury inquiry into whether various corporate defendants concertedly re-

stricted the supply of crude oil into the United States would hardly be relevant to that lawsuit. Yet, the standard applied by the district court in this action would hold that it would be, and thus flouts the teaching of *Procter & Gamble* and eliminates "relevance" as a condition for disclosure.

Additionally, the district court in the instant case did not require from Petrol Stops any proof or substantial showing that without the transcripts Petrol Stops would be greatly prejudiced or that an injustice would be done. At the time of the filing of the petition before the California court, Petrol Stops had not bothered to view any documents Douglas or Phillips had offered to produce, nor had Petrol Stops deposed any employees or ex-employees of these two defendants. (A. 62-63) By not even making a modest inquiry into whether or not Petrol Stops could acquire the information it sought without breaching the sanctity of the grand jury, the district court judge failed to require a showing of particularized need as mandated by this Court.

Finally, the district court failed to require that the need shown be sufficiently particularized. This Court in *Procter & Gamble* contemplated that any disclosure of grand jury testimony would only be made following a showing of a specific and immediate use for the requested material, *e.g.*, for the purpose of impeaching or aiding the recollection of an identified witness or witnesses. The need demonstrated has to be particular and not general. The purported "particularized need" offered by Petrol Stops in this case was simply that all the transcripts might be useful to impeach a single interrogatory answer.[17] Given the extremely broad nature of that inter-

[17] Petrol Stops, in their original memorandum which accompanied their petition before the district court, asserted a "need" for grand jury documents which rested on alleged factual inaccuracies in interrogatory responses by Douglas and Phillips.

rogatory, the "particularized need" of Petrol Stops for the grand jury transcripts was really the need to find some evidence to suggest that the defendants in their lawsuits are guilty and not innocent. No more general need could be imagined. No particularized showing was offered, nor could there be any, since Petrol Stops could not impeach the testimony in their lawsuits of a Douglas or Phillips employee until Petrol Stops first deposed an employee or ex-employee of one of those companies.[18]

Petrol Stops' argument ran as follows: In February of 1974 (over a year before the indictment was returned), Petrol Stops propounded interrogatories in which defendants were asked to state whether they had had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Both Phillips and Douglas responded to the above interrogatory stating that they were unaware of any such conversations or communications. Petrol Stops then noted in their papers that Phillips and Douglas were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from 1970 through 1971 and that both Phillips and Douglas "entered *guilty* pleas to the charges of conspiracy and price-fixing contained in the indictment." (Emphasis added.) (A. 104) Therefore, concluded Petrol Stops, both Phillips and Douglas must have perjured themselves in their interrogatory answers. However, neither Douglas nor Phillips have ever pleaded guilty to such charges and the logic of Petrol Stops' syllogism is therefore faulty. Sometimes after all the other indicted companies had pleaded *nolo contendere* to the charges against them, Phillips and Douglas decided, with the court's approval, to change their pleas to *nolo contendere*. This plea is not the equivalent of a plea of guilty, and is certainly not for the purpose of demonstrating general "perjury".

[18] The inability of Petrol Stops to demonstrate to the district court a particularized need for testimony and to prove that without the transcripts it would be greatly prejudiced is well illustrated by their desperate attempt to place before the appellate court matters never before the district court and wholly extraneous to the appeal. In a motion to supplement the record, Petrol Stops sought to include certain unfinished and unsigned deposition testimony of Douglas employees and ex-employees which had been taken *after* the district court's ruling and two statements by a former member of the Department of Justice. (A. 22 *et seq.*) Petrol Stops' motion to supplement the

Concomitantly, the district court erred in ordering the production of the *entire* transcripts. This Court in *Procter & Gamble* characterized the cases where particularized need had been shown as being those "[w]here the secrecy of [grand jury] proceedings is lifted *discretely and limitedly* [emphasis added]." 356 U.S. at 683. Assuming *arguendo* that some particularized need was demonstrated, the district court would still only be permitted to order disclosure of those portions of the transcript which clearly pertain to the need shown by the seeking party. Here, consistent with the district court's initial failure to carefully scrutinize Petrol Stops' showing of need or to consider the issue of relevance of the materials to the civil actions, the court further erred by ordering the wholesale production of the grand jury transcripts.

B. The District Court Erroneously Held That No Need For Grand Jury Secrecy Existed In This Case

The district court judge repeated the test of Mr. Justice Douglas in *Procter & Gamble*, and listed the five policy reasons underlying the grand jury secrecy rule. (A. 53-54) He then discussed how the fourth policy reason, *i.e.* to encourage disclosure of information to the grand jury,

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record with these irrelevant materials was properly denied by the court of appeals. (A. 9) *See* note 11, *supra*.

In designating portions of the record to be included in the Appendix filed with this Court, Petrol Stops has persisted in their attempt to use these extraneous materials. Petrol Stops has insisted that their motion to supplement the record (which motion was denied), including the documents which were the subject of and attached to that motion, be included as a part of the Appendix. The result is that materials which were not a part of the record before the district court or initially before the appellate court are now contained in this Court's Appendix. These materials should have no effect on this Court's decision. Petrol Stops' persistence in having them included in the record merely underscores the weakness of their showing of particularized need before the district court.

was pertinent, but that in this instance it was no longer a concern.

> So the fourth [policy reason] is the only one that has pertinence, but the defendants in this case have all the information . . . So if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.
>
> And when you get right down to it, this is a civil antitrust action. . . . Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also. (A. 54-55)

In *Procter & Gamble*, it was held that, although the grand jury transcripts were being utilized by the government in preparation for its civil antitrust case, the defendants in the suit would not be afforded the same privilege without a demonstration of particularized and compelling need. This Court rejected defendants' argument that only by means of the grand jury transcripts could the defendants get the information.

Although the possession by Douglas and Phillips of the grand jury transcripts might arguably reduce the concern that disclosure would impair the future flow of information to the grand jury, it cannot eliminate it. The chilling effect of all other possible forms of retaliation continues to be an important concern. The court below was charged with protecting this concern, but it failed to do so.

Finally, not only did the court below fail to protect the fourth concern for grand jury secrecy, but the unwarranted action it took succeeded in endangering other policy concerns. By ordering disclosure of entire transcripts, the court below failed to protect the innocent accused who is exonerated from disclosure of the fact that he had been under investigation. *See* pages 13-14, *supra*. By ordering disclosure of entire transcripts, the

court below failed to insure the utmost freedom of future grand juries in their deliberations. *See* pages 14-15, *supra*. The failure both to require a particularized need and thereafter to order a limited disclosure endangered the three historical reasons advanced in support of the policy for grand jury secrecy.

III

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO FOLLOW AVAILABLE PROCEDURES TO INSURE THAT THE DETERMINATION OF COMPELLING NEED FOR GRAND JURY TRANSCRIPT DISCLOSURE BE MADE BY THE COURT BEST ABLE TO MAKE THAT DETERMINATION

The district court below did not carry out this Court's mandate largely because it could not; it was neither apprised of the needs of the civil litigants nor of the facts of the criminal proceeding. In situations such as this where a civil action is filed in a court other than the one in which the grand jury sat, a procedure must be observed that insures that the court having the most complete information and being the most competent to determine the issues before it is in fact the one which will make the determination of particularized need and compelling necessity.

A. The Question of Whether A Civil Litigant Has Shown A Sufficient Particularized Need For Grand Jury Transcripts Is Best Determined By The Court In Which The Civil Suit Is Pending

A district court must be well informed about the factual and legal issues in a civil case before it can competently rule on whether a civil litigant has a particularized need for the grand jury materials he seeks. Where the civil case is a complex antitrust action, the task of

becoming sufficiently informed about the lawsuit can be formidable. Before a court can determine the relevance of materials sought, it must understand the subject matter of the pending action. In the case at bar, a district court judge in the Central District of California who was unfamiliar with the civil suits in the Arizona federal courts was required to examine two different, expansive antitrust complaints. (A 129-167) In one, *Petrol Stops Northwest v. Continental Oil Company,* Civ. No. 73-212 TUC-JAW (D. Ariz.), twelve corporate defendants including Douglas and Phillips were generally charged by Petrol Stops Northwest with 68 Sherman Act violations in 31 paragraphs ranging from a conspiracy to limit the supply of crude oil in the United States (A. 141) to the imposition of retail price schedules on "independent businessmen". (A. 144) In the other, *Gas-A-Tron of Arizona v. Union Oil Company of California,* Civ. No. 73-191 TUC-WCF (D. Ariz.) 28 Sherman Act violations together with Robinson-Patman violations were alleged to have been perpetrated by nine oil companies, including Phillips, but not Douglas. (A. 148-167) Because of the length and breadth of complaints such as these, a district court is normally required, if it is to acquire even a preliminary knowledge of the allegations, to expend considerable time examining and analyzing the many allegations continued therein.

More than the mere examination of a complaint is required, however, for a court to gain an understanding of the subject matter of a lawsuit in order for it to be able to decide the preliminary issue of relevancy. For example, only those matters complained of which can, as a matter of law, provide plaintiff with a basis for recovery should be considered in determining issues of particularized need. Precisely which allegations contained within a complex antitrust complaint provide a plaintiff with a basis of recovery is a question that often can be answered only when the court acquires con-

siderable knowledge of the business practices of the parties involved. A court may not be able to determine whether a plaintiff has standing to sue a defendant under a particular allegation unless and until it knows facts not contained in the complaint.[19] *E.g.*, a court may not be able to determine whether any of the allegations in the complaint involves the presence of intervening purchasers that would bar any recovery by this plaintiff unless and until it knows facts not contained in the complaint. *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977). A court, therefore, may not know whether material is relevant to a pending action unless and until it is intimately familiar with all the allegations, the broader legal issues and the underlying facts involved in the action.

In a protracted antitrust case, only the court responsible for that litigation can reasonably be expected to educate itself sufficiently as to the complex legal and factual issues in order to determine which items are relevant to the subject matter of the pending action. That court has all the information, or at least the incentive and wherewithal to acquire all the information, necessary to determine the relevancy issue. The incentive exists because that court, in the exercise of its judicial function, cannot avoid eventually examining and deciding these very issues. Indeed, the "bible" for complex actions, *Manual for Complex Litigation*, warns the trial judge

[19] For example, facts will be required to determine whether the anti-competitive effects of the alleged violation caused his injury. *E.g., Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *GAF Corp. v. Circle Floor Co., Inc.*, 463 F.2d 752, 758-59 (2d Cir. 1972), *cert. denied*, 413 U.S. 901 (1973); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); or whether plaintiff was engaged in activities in the particular area of the competitive economy at which the alleged restraint was aimed. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977); *Reibert v. Atlantic Richfield Co., supra., Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

that the experience of decades demonstrates the need for him to take immediate control of the litigation.[20] For example, he is instructed not to permit broad merits discovery until discovery has taken place on certain threshold issues such as class action, fraudulent concealment and, *a fortiori*, standing to sue or "injury".[21] In this case it is clear from the remarks of the district judge below that he did not carefully examine the subject matter of the civil litigation and compare it to the matters covered in the grand jury investigation.

The importance of having the court in which the civil suit is pending decide issues of relevancy is underscored by a number of recent studies, all of which are concerned with abuses of discovery.[22] This includes the currently suggested revisions to Rule 26(b)(1), Federal Rules of Civil Procedure. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has suggested that the permissible scope of discovery be changed so that discovery will be permitted only regarding "any matter not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party" rather than upon "any matter not privileged, which is relevant to the subject matter involved in the pending action."[23] This revision is intended to limit the sweeping

[20] Section 1.10 of the *Manual for Complex Litigation* (3d ed. 1977).

[21] Section 0.60 of the *Manual for Complex Litigation* (3d ed. 1977).

[22] *See e.g., Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association* (October 1977, Second Printing and Revision December 1977).

[23] *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,* March 1978, Proposed Advisory Committee Note to Rule 26, reported in 77 F.R.D. 613, 627 (1978).

and potentially abusive discovery permitted under the present rule,[24] and the new rule would necessarily require that the factual and legal issues first be substantially developed. Only a court charged with the administration of a civil suit can be expected to work through the competing assertions of counsel and identify those many issues.

Judicial economy is best served if the court in which the civil suit is pending determines whether a particularized need for disclosure of grand jury material exists in a particular case. No useful purpose is served where a second court expends judicial resources to rule on issues better determined in another court that must ultimately consider those same issues anyway. *Cf., Gibson v. United States,* 403 F.2d 166, 167 (D.C. Cir. 1968). In addition, the undesirable effect of a foreign district court's ruling can extend well beyond the mere waste and duplication of effort. That ruling can actually impede the judge whose judicial task it is to oversee and manage the trial of a complex antitrust action. Very often the effective management of such a case requires, not only that the judge decide the matters upon which discovery is to be permitted, but that the judge determine the *order* in which factual and legal issues are to be developed. A strong, informed judge who takes early control of a complex case can direct pretrial proceedings in a manner which will most efficiently forward the disposition of the case.[25] Rulings by a foreign court may

[24] *Id.*

[25] The need for strong judicial control of the complex case has itself formed the basis of the Federal Judicial Center's *Manual for Complex Litigation,* which suggests that a complex case be assigned to a single judge "to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings." *Manual for Complex Litigation,* § 0.30 (3d ed. 1977). It further suggests that discovery be discretely permitted in stages, *Id.* § 0.50, as it is crucial that the judge "provide an early and efficient schedule of pretrial discovery and preparation." *Id.* § 1.10.

well require the judge overseeing the case to depart from a carefully chosen, desirable course for the pretrial proceedings.

One final reason requires that the judge presiding over the civil action determine whether "particularized need" exists. A procedural rule which permits some other court to make the particularized need determination signals to a civil litigant that he may substitute the judgment of a foreign court for that of the presiding judge concerning an important pretrial issue. In this case, for example, Petrol Stops filed a request in the trial court for production of the grand jury materials. This was objected to by the defendants. Instead of seeking an order from the Arizona court under Rule 37 of the Federal Rules of Civil Procedure compelling production of the transcripts, Petrol Stops chose to petition the California District Court. Where a civil litigant can choose between courts (and thereby judges) to decide such issues, litigants can avoid a determination by a court more familiar with the lawsuit.[26] This opportunity permits the resourceful litigant much more than "forum shopping"; if the foreign court fails to order the government to produce such transcripts the civil litigant can simply return to the court where the civil action is pending and get a second opportunity to argue the same questions.

[26] The opportunity for forum shopping in such a situation is particularly invidious as litigants seeking disclosure are often able, not only to choose the court who will decide the issue, but to choose the *judge* who will determine the matter. A petition for production of grand jury materials is normally assigned to a miscellaneous docket to be heard by the duty judge. The civil litigants can determine whether they would rather have the duty judge or the judge having jurisdiction of the civil action hear the petition.

B. The Question Of Whether Any Reasons Remain For Protecting The Secrecy Of The Grand Jury Proceedings Can Be Gauged At Least As Well By The Court In Which The Civil Suit Is Pending As By A Judge In The District In Which The Grand Jury Proceedings Were Held

This brief has previously discussed the reasons for continued secrecy with respect to grand jury materials after the termination of criminal proceedings. The court in which the civil suit is pending is well equipped to evaluate these reasons. Where lower courts properly apply *Procter & Gamble* and disclose only those portions of the grand jury transcripts necessary to satisfy a particularized need, the problems of protecting the innocent accused and the free deliberations of grand jurors are minimized.

The remaining reason for secrecy, that of encouraging free and untrammeled disclosure of information in future grand jury proceedings, involves general issues of policy rather than particular facts. No one district court is better equipped than another to weigh that concern. To the extent facts are needed to determine whether disclosure would affect the flow of information in the future, those facts would include (1) the matters contained in the particular grand jury transcript sought; (2) knowledge of the witness, his position and activities, and (3) a general familiarity with the industry in which a witness works.[27] The court in which the grand jury sat has no greater familiarity with these facts (and probably less) than the court handling the civil action. Indeed, a judge

[27] Knowledge of the content of a transcript might indicate to what extent a particular witness would be adversely affected by disclosure. Knowledge of his activities and the industry in which he works could suggest the extent of the "chilling impact" on the future flow of information to the grand jury, depending upon the visibility of the adverse effects of disclosure upon the witness.

in the district where the grand jury proceedings were held may have no knowledge whatsoever of the grand jury or of the criminal proceedings.[28] Such was the situation in this case.

C. The District Court Below Should Have Denied Petrol Stops' Petition And Referred The Matter To The Court In Which The Civil Suit Is Pending Since That Court Was Fully Competent To Order Disclosure Of Grand Jury Transcripts In The Possession Of Parties To That Litigation

Plaintiffs sought disclosure of certain grand jury transcripts. Copies of all these transcripts were in the possession of Douglas and Phillips. The Arizona court has the power to order disclosure to the civil plaintiffs of the grand jury transcripts in the possession of Douglas and Phillips. There is no language in Rule 6(e), Federal Rules of Criminal Procedure, or in Rule 34, Federal Rules of Civil Procedure, prohibiting a court other than the one in which the grand jury sat from ordering disclosure of grand jury materials from parties within its jurisdiction.[29] To the contrary, the language of Rule 34 supports this view. There is no indication in *any* of the advisory notes of the Judicial Conference to either Rule 6(e) of

[28] Where an indictment is returned by a grand jury and a *nolo contendere* plea is accepted, no judge of that court would likely have had occasion to read and know the contents of the grand jury transcripts. After a United States attorney receives authorization to conduct a grand jury investigation, the knowledge of a judge "supervising" the grand jury is limited to an explanation of the general nature of the contemplated investigation by the prosecuting attorney. The judge would normally have no familiarity with testimony contained within grand jury transcripts. *See, Antitrust Grand Jury Practice Manual* at 9, 16, 23 (1975).

[29] This presumes that the materials sought are in the possession of a party under the jurisdiction of the court. *E.g.*, it is not argued that the Arizona court had the power to order the government, in a foreign jurisdiction, to produce its copies of the transcripts.

the Federal Rules of Criminal Procedure or Rule 34 of the Federal Rules of Civil Procedure that grand jury materials may only be disclosed by the court in which the grand jury was empanelled. Similarly, no legislative intent that a contrary rule was contemplated may be inferred from any statute modifying or amending either Rule 6(e) or Rule 34.[30] Moreover, the policy reasons discussed in previous sections of this brief wholly support the view that the civil litigation court rather than the grand jury court is generally better able to determine whether a compelling need exists and, therefore, ought to be the court to order disclosure of grand jury materials when copies are in the possession of parties to that litigation. The only "support" for the proposition that in all cases only the grand jury court is competent to order disclosure of grand jury materials is found in one case which fails to provide a persuasive rationale for that position.[31] More importantly, most of the courts which have considered the related issue have recognized the propriety of having the court familiar with the case for which disclosure is

[30] The legislative history on the Congressional modification of Rule 6(e); *i.e.*, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977), and the cases referred to therein, dealt with disclosure by the government's attorneys to other government employees or agencies to assist in the investigation. S. Rep. No. 354, 95th Cong., 1st Sess. 5-8 *reprinted in* [1977] U.S. Code Cong. & Ad. News 527, 529-532. The proper court to rule upon a disclosure during the course of the grand jury's proceedings would be that court in which the grand jury sat. It does not follow that that court is necessarily the proper one once the proceedings have concluded.

[31] *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957); *see also Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1130 n. 4 (9th Cir. 1978) (dicta); *State of Illinois v. Sarbaugh*, 552 F.2d 768, 772-773 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977) (dicta); *In re Grand Jury Investigation of Banana Industry*, 214 F. Supp. 856 (D. Md. 1963) (dicta).

sought determine particularized need.[32] This Court has never addressed these issues.

Rule 6(e), Federal Rules of Criminal Procedure, in pertinent part provides that matters occurring before the grand jury may be disclosed by an individual "only where so directed by the court preliminarily to or in connection with a judicial proceeding." None of the notes of the Advisory Committee to the Judicial Conference shed any light on the intended meaning of "the court" in the rule. On April 26, 1976 by order of this Court Rule 6(e) was amended[33] to provide in relevant part:

> (c) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

The revision changed the phrase "by the court" to "by a court". That change was unaccompanied by any explanation or rationale. No advisory notes on the change exist and no legislative intent may be gleaned from any of the Congressional hearings. It apparently was a change without an intended difference. From the language of the rule alone, it remains unclear which court or courts are referred to in Rule 6(e) as those competent to order disclosure of grand jury materials in connection with a judicial proceeding.

Procedural rules that must be read *in pari materia* with Rule 6(e) support the view that courts other than

[32] *See e.g., State of Illinois v. Sarbaugh*, 552 F.2d 768, 773, n. 5 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois*, 434 U.S. 889 (1977); *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1076 (2nd Cir. 1974); *Gibson v. United States*, 403 F.2d 166 (D.C. Cir. 1968); *City of Philadelphia v. Westinghouse Electric Corp.* 210 F. Supp. 486 (E.D. Pa. 1962).

[33] Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977), modified the Supreme Court amendment. Under section 4(b) of the act the amendment became effective October 1 1977, 91 Stat. 322.

the one having jurisdiction over the grand jury have the power to order disclosure of grand jury materials in the possession of individuals in their jurisdiction. Rule 34 of the Federal Rules of Civil Procedure provides in pertinent part that a party may serve a request on another party to produce for inspection and copying "any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. . . ." The scope of discovery under Rule 26(b) of the Federal Rules of Civil Procedure extends "to any matter not privileged, which is relevant to the subject matter of the pending action." Grand jury materials are not absolutely privileged nor necessarily beyond the scope of the subject matter of a pending action. Disclosure of grand jury materials may be permitted under Rule 34, but only where a compelling necessity for the materials sought is demonstrated by the civil litigant. *United States v. Procter & Gamble Co., supra; State of Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *United States v. Scott Paper Co.*, 254 F. Supp. 759 (W.D. Mich., 1966); *Hancock Bros., Inc. v. Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968). Indeed, Petrol Stops initially moved in these cases to obtain transcript copies by means of a request pursuant to Rule 34 directed to Douglas and Phillips. The broader construction of the phrase "the court" in Rule 6(e) promotes to the fullest extent the policies contained in both the Rules of Civil and Criminal Procedure:[34] grand jury secrecy is accorded stringent

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[34] A rule that the court with jurisdiction over the grand jury is the only court that can order disclosure of grand jury materials could have several anomalous effects. For example, that rule would be particularly unfortunate where the government, for whatever reason, no longer had copies of the grand jury transcripts and a civil litigant had the only existing copies but was outside the jurisdiction of the court in which the grand jury sat.

protection while civil litigants are permitted the broadest possible discovery in pursuit of their claims.

The one district court which has specifically ruled on the meaning of "the court" in Rule 6(e) has held that only the court having jurisdiction of the grand jury may order disclosure of those materials.[35] That court, in so ruling, provided no compelling rationale for its decision.[36]

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[35] *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957).

[36] In *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957), a defendant in a civil action brought in another district court sought the production of grand jury minutes in the custody of the Attorney General in the District of Columbia. The grand jury proceedings had been held in the District Court of Massachusetts. The District of Columbia court held that it did not have jurisdiction under Rule 6(e) and stated that the seeking party should apply to the Massachusetts court.

The *Schwabe* case is distinguishable from the case at bar in so far as the District of Columbia court did not have jurisdiction over either the grand jury or the civil action. The *Schwabe* court examined Rule 6(e) Federal Rules of Criminal Procedure, noting that the rule forbids disclosure of matters occurring before the grand jury unless "solicited by the Court or permitted by the Court." *Id.* at 234. It then concluded that "the court" as used in Rule 6(e) was limited to the court having jurisdiction of the grand jury. The reasoning offered was largely conclusory:

> Obviously, the Court that has jurisdiction over the grand jury is in a better position to determine whether there should be a disclosure of the grand jury minutes than any other Court. It might lead to conflicts and possibly to chaos if any one of the ninety or more United States District Courts could direct the disclosure of the minutes of a grand jury sitting in any other District. *Id.* at 235.

Respectfully differing with that district court judge, it is not obvious at all that the grand jury court is best able to determine the propriety of disclosure. Quite the contrary, it is the court with jurisdiction of the judicial proceeding for which the materials are sought that is best able to provide that guidance. When one systematically works through all the constituent is-

However, other courts which have considered the related issue have noted the prudence of having the court handling the civil proceeding determine issues of particularized need. The United States Court of Appeals for the District of Columbia Circuit recognized that only the court responsible for the judicial proceeding for which grand jury materials are sought is competent to determine whether a compelling necessity for disclosure actually exists. In *Gibson v. United States,* 403 F.2d 166 (D.C. Cir. 1968), the appellant was arrested on charges of assault. A grand jury, when presented with the case, returned a no true bill. Thereafter the United States attorney initiated prosecution in the court of general sessions charging the appellant with assault. The appellant then filed a motion in the district court for the production of the grand jury testimony of the complainant and other witnesses. The district court refused to grant access on the alternative grounds that the appellant had not shown the requisite need and that disclosure would be inappropriate in the absence of a preliminary finding by the court of general sessions that disclosure of grand jury testimony was warranted.

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sues, as has been done in this brief, it is obvious that that court is best capable of the task.

The *Schwabe* court's concern that a rule permitting courts other than the grand jury court to order production of grand jury materials would lead to conflicts and chaos is wholly unfounded. Because a court has the power to rule on a matter does not dictate that the court do so where the reasonable exercise of discretion requires that the court do otherwise. Unapprised of the reasons disclosure was sought, the District of Columbia court rightly referred the matter to the court with knowledge of those matters. That action was proper whether or not the District of Columbia had the power to rule on the motion before it. The better rule is that the District of Columbia Court had the power to rule on the motion, but the proper exercise of discretion required that it refer the question to a court informed about the subject matter. Failure to follow this rule might itself lead to chaos.

In affirming the order of the district court, the circuit court recognized the wisdom of having the informed court decide the issue.

While agreeing that the District Court could order production under Rule 6(e), however, the Government argues that the District Court established a sound administrative procedure for cases of this sort by refusing to grant access to the grand jury testimony without a request or certification by the Court of General Sessions that production would be warranted. The procedure suggested by the Government is attractive. If the defendant prosecuted in the Court of General Sessions first requested that court to make such a certification, the District Court could rely upon a finding by the court where the case was pending; it would not face the need itself to examine the circumstances of a case in which it was not otherwise involved. A refusal by the Court of General Sessions to certify that production would be appropriate could be reviewed by the District of Columbia Court of Appeals after conclusion of the trial as part of an appeal from conviction; piecemeal appellate review would thereby be avoided. *Id.* at 167-168.

The Seventh Circuit Court of Appeals in *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir.), *cert. denied sub nom., J. L. Simmons Co. v. Illinois,* 434 U.S. 889 (1977), stated in dicta that "the reference [in Rule 6(e) to the court] must be to the court of the district in which the grand jury was convened", 552 F.2d at 772-773, without offering any supporting reasons for that conclusion except "[i]t is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of the grand jury procedings." 552 F.2d at 773. However, even the Seventh Circuit favorably viewed the procedure

taken by the lower court in that case which did permit the court hearing the civil case to rule on particularized need.

> We do not imply disapproval of the procedure adopted by the District Court in this case of transferring the transcripts to the district in which the trial was to be held, so that court can make determinations of particularized need during trial, which the transferor court is not in a position to do. In a case in which the secrecy of the transcripts had not already been partially breached . . . and there is a likelihood that a particularized need will arise during trial, that procedure would be eminently sensible and, we believe, within the power of the court of the district in which the grand jury is convened. Cf. *Baker v. United States Steel Corp.*, 492 F.2d 1074, 1076-1077, 1078 (2d Cir. 1974); *Gibson v. United States*, 131 U.S. App.D.C. 143, 403 F.2d 166, 167-168 (1968). *Id.* at 773 n. 5.

The court in which the judicial proceeding is pending is consistently recognized by most courts as the court best able to determine whether disclosure of grand jury materials is proper. Yet a few courts still incur substantial hardship and expense by mechanically observing what they believe to be a procedural rule for which there is neither compelling rationale nor legislative support. A construction of Rule 6(e) which permits the court having jurisdiction of the judicial proceeding for which grand jury materials are sought to order disclosure of those materials from a party within its jurisdiction is eminently prudent and reasonable.

D. The District Court Below Should Have Denied Petrol Stops' Petition Or Alternatively Merely Have Ordered The Transfer Of The Transcripts To The Court In Which The Civil Suit Is Pending

The district court below had available a number of procedures which would have properly placed before the

civil action court the compelling necessity issue. The district court abused its discretion by not adopting one of the following procedures: certifying the question of need to the civil court, ordering production of the transcripts to that court so it could determine whether a particularized need for disclosure existed, or refusing to grant the petition to produce and sending Petrol Stops back to the Arizona court for that court's decision on the issue. As outlined above, the majority of the courts have commended just such procedures.[37]

A model procedure was that employed by Chief Judge Clary of the United States District Court for the Eastern District of Pennsylvania. In *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962), Judge Clary was asked by a civil litigant to order the production of the grand jury transcript of a particular witness. The grand jury had been held in the district court over which the judge presided. The civil action out of which the request for the specific transcript arose was also before Judge Clary. The civil action, however, was one of 1800 civil antitrust actions brought against manufacturers of heavy electrical equipment by customers alleging damages arising out of the same circumstances that had previously resulted in criminal judgments against the same defendants in Judge Clary's court. Judge Clary himself ruled on the request from the civil litigant whose case was before him. But, recognizing that litigants in other district courts with cases pending which alleged the same subject matter would also ultimately seek the grand jury materials over which he had jurisdiction, the judge proposed to make the transcripts available to other trial judges in order that they could make the particularized need determination which they alone were competent to do. Judge Clary stated:

> If, at the completion of any deposition taken in the national program, a motion is made for the production

[37] *See* note 32, *supra*.

of that witness's grand jury testimony, and if the deposition judge requests it from this court for examination in camera, the testimony will be immediately made available to him. The deposition judge may then contrast the grand jury testimony with the deposition and determine, in his own discretion, whether in the interests of justice, there is compelling need for disclosure.

Not all situations that may confront a deposition judge can be foretold or foreseen, but some workable program in this connection must be devised which will insure the production of grand jury testimony under proper safeguards. *Id.* at 491.

See Atlantic City Electrical Co. v. General Electric Co., 244 F. Supp. 707 (S.D.N.Y. 1965) and *Consolidated Edison Co. of New York v. Allis-Chalmers Manufacturing Co.*, 217 F. Supp. 36 (S.D.N.Y. 1963) for the application of this ruling by other trial judges. The court recognized that it did not have the information necessary to make the determination of whether a party seeking grand jury transcripts had sufficiently demonstrated a particularized need. Where a judge cannot make that determination, the proper exercise of judicial discretion to insure the safeguards of the grand jury system require that he defer such a judgment to another judge who can. This procedure should have been, but was not, followed by the district judge below.

CONCLUSION

The judgment of the district court should be reversed. An order should be entered rendering judgment for petitioners on the following grounds: (1) that the district court below abused its discretion by ordering disclosure of entire grand jury transcripts without a showing of compelling necessity; and (2) that the district court abused its discretion by not adopting an available pro-

cedure which would have permitted the Arizona court to participate in the determination of compelling necessity.

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Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY,
Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

By this petition defendants in private antitrust actions seek to deny their adversaries access under a "stringent" protective order to grand jury materials already disclosed to the defendants and in their possession, claiming considerations of grand jury secrecy warrant their advantage.

QUESTIONS PRESENTED

A. Whether under Rule 6(e), Federal Rules of Criminal Procedure, a district court abused its discretion by ordering production of grand jury materials to plaintiffs' counsel in private antitrust actions when

1. The indictment and complaints include virtually identical charges of price fixing against the defendants;

2. The criminal proceedings had concluded with the indictment and conviction of the defendants on *nolo* pleas;

3. The only grand jury materials ordered produced were transcripts already disclosed to the defendants and documents produced by the defendants;

4. The defendants denied the charges of price fixing in the private actions and denied under oath in those actions having any communication with each other concerning prices; and

5. Production was proscribed under a protective order which

a. Limited disclosure to plaintiffs' counsel; and

b. Limited use by counsel to testing or attacking credibility.

B. Whether under Rule 6(e), Federal Rules of Criminal Procedure, a district court charged with supervision of a grand jury is compelled to refer a Rule 6(e) petition by a plaintiff in a private antitrust action to the district court before which the antitrust action is pending.

C. Whether defendants to a concluded criminal proceeding have any standing to challenge an order pursuant to Rule 6(e), Federal Rules of Criminal Procedure, requiring the government to produce grand jury materials.

STATEMENT OF THE CASE

A. Parties and Proceedings Below

Respondents, Petrol Stops Northwest ("Petrol Stops"), Gas-A-Tron of Arizona ("Gas-A-Tron"), and Coinoco, and petitioners, Douglas Oil Company ("Douglas") and Phillips Petroleum Company ("Phillips"), are respectively plaintiffs and defendants in two private antitrust actions pending in the United States District Court for the District of Arizona. Petrol Stops, Gas-A-Tron and Coinoco, related companies, are independent retail marketers of gasoline. (A. 130, 149-150)[1] Phillips and Douglas, a wholly-owned subsidiary of Continental Oil, are major oil companies. (A. 131, 135-36.) Gas-A-Tron and Coinoco are plaintiffs in *Gas-A-Tron v. Union Oil Company of California,* Civil No. 73-191 TUC-WCF (D. Ariz.) (*"Gas-A-Tron"*), filed on November 2, 1973 and assigned to the Honorable William C. Frey. (A. 148-167) Petrol Stops is the plaintiff in *Petrol Stops Northwest v. Continental Oil Company,* Civil No. 73-212 TUC-JAW (D. Ariz.) (*"Petrol Stops"*) filed on December 13, 1973 and assigned to the Honorable James A. Walsh. Phillips is a defendant in both actions. Douglas is a defendant in Petrol Stops[2]. A motion to add Douglas as a party defendant in *Gas-A-Tron* has been pending for almost one year.

Discovery in *Gas-A-Tron* and *Petrol Stops* was stayed for over two years pending an unsuccessful attempt to disqualify plaintiffs' counsel. *Gas-A-Tron of Arizona v. Union Oil Company of California,* 534 F.2d 1322 (9th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976). During this stay, on

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[1] The following abbreviations are used for the purpose of citation in this Brief: (1) "A." refers to the joint Appendix; (2) "R.A." refers to the Appendix included within the Brief of Respondents.

[2] Petrol Stops, Gas-A-Tron and Coinoco are referred to in this Brief as plaintiffs, and Douglas and Phillips as defendants.

March 19, 1975, Phillips and Douglas were both indicted in the Central District of California in *United States v. Phillips,* Criminal Docket No. 75-377 (C.D. Cal.) (A. 118-122) On the same day the government filed a companion civil complaint. (A. 123-128)

The criminal proceedings were concluded with the entry by Phillips and Douglas of ***nolo contendere*** pleas on December 3, 1975. (A. 69) Each defendant was fined $50,000. The companion civil case was terminated by the entry of a consent decree. (A. 69)

The plaintiffs in *Gas-A-Tron* and *Petrol Stops* filed a Rule 6(e) petition on December 1, 1976 in the United States District Court for the Central District of California against the government seeking certain grand jury materials in *United States v. Phillips, supra.* (A. 114-117) The plaintiffs filed the Rule 6(e) petition in that court rather than in the Arizona actions, because as the circuit court recognized, they believed that was the proper court in which to proceed to gain access to the grand jury materials. (A. 3, 70-71) The Rule 6(e) petition sought only the production of grand jury transcripts that had previously been produced to Douglas and Phillips as criminal defendants in *United States v. Phillips, supra,* and documents produced by Phillips and Douglas to the grand jury in that criminal proceeding. (A. 115) These grand jury materials are still in the defendants' possession. (A. 100)

The government did not oppose the Rule 6(e) petition on the ground plaintiffs had made a sufficient showing of "particularized need." (A. 99-100) Phillips and Douglas did *not* petition to intervene but appeared "as real parties in interest" in opposition.

The Rule 6(e) petition was assigned to the Central District's miscellaneous docket and after extensive brief-

ing, was called on for hearing. The judge conducted the hearing in the form of Socratic colloquy with counsel for the purpose of testing the court's tentative conclusions with regard to the Rule 6(e) petition. The defendants' summary of the hearing before the district court is not only inaccurate but unfair to the thoughtful attention given by the court to its ruling on the Rule 6(e) petition. (Compare Petitioners' Br. at 6-7, 21-28, with A. 52-64)

The court, contrary to the defendants' contention (Petitioners' Br. at 2, 7, 21-23) was not unconcerned with whether the requested materials were relevant to the claims in *Gas-A-Tron* and *Petrol Stops,* but concluded they were relevant on the ground that the price fixing violation charged in the indictment was substantially the same as those included in the complaints in *Gas-A-Tron* and *Petrol Stops.* At no time did the defendants ever suggest that the grand jury materials that were in their possession were irrelevant to the claims in *Gas-A-Tron* or *Petrol Stops,* nor did the defendants request that the court examine any of those materials *in camera* to determine whether they were irrelevant. *The defendant, moreover, did not accept Judge Gray's offer that he would, at the defendants' request, contact Judge Walsh and Judge Frey to determine whether they had any concern or objection to his proceeding to dispose of the issues raised by the Rule 6(e)petition—"I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection . . . ."* (A. 56, 58)

The district court concluded in view of the prior disclosure of the requested grand jury materials to the defendants there was no continued reason for grand jury secrecy. At no time did the defendants suggest that the disclosure of any of the materials in their possession to

plaintiffs' counsel raised any risk in terms of the reasons for grand jury secrecy nor did they suggest that the court examine any of the material *in camera* to determine whether there was any reason for continued secrecy.

The district court concluded that under Rule 6(e) it was the proper court to hear the plaintiffs' petition. The defendants did not question the court's power to decide the petition. (A. 55) The defendants told the court, "As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction." (A. 63)

The defendants' repeated contention "the district court erred in ordering the production of the *entire* transcripts" (Petitioners' Br. at 26, 27, 13-15) is false. The district court only ordered the production of grand jury transcripts in *United States v. Phillips, supra,* that had been disclosed to Douglas and Phillips and documents that had been produced by defendants. (A. 48-49) The district court further granted access only to those materials under a protective order that limited disclosure to plaintiffs' counsel and use of such materials for the purpose of impeachment, refreshing recollection, and testing credibility (A. 2, 48-49) and required the return of the materials upon the conclusion of the litigation.

The defendants appealed, and the Ninth Circuit affirmed. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978), *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978). The Ninth Circuit held (1) the defendants had standing to appeal, (2) the district court charged with supervision of the grand jury was the proper court to rule on a Rule 6(e) petition, (3) a showing of "particularized need" was required for the disclosure of grand jury materials, (4) the determination of "particularized need" required a balancing of the public interests served by continued grand jury secrecy against the plaintiffs' need for the information, (5) the need for secrecy was at best "light" since Douglas and Phillips had already examined the materials requested, (6) the plaintiffs had demonstrated a "particularized need" beyond the relevance of the materials since the grand jury materials might well contradict Douglas' and Phillips' answers to interrogatories, (7) inconsistencies between depositions taken after the district court's order and the government's Bill of Particulars strengthened the showing of "particularized need", and (8) the carefully limited disclosure granted under a "stringent" protective order was not an abuse of the district court's discretion.

B. The Indictment and Complaints Included Identical Charges of Price Fixing

In *Petrol Stops* the plaintiff brought an antitrust action against 11 major oil companies and Armour Oil Company, claiming violations of Sections 1 and 2 of the Sherman Act. (A. 129-147) The complaint in *Petrol Stops* alleged Petrol Stops was engaged as an independent marketer in the retail distribution of gasoline in California, Oregon, Washington, and Arizona, and several other states. (A. 130-141) Prior to 1973 Petrol Stops marketed gasoline through 104 gasoline stations with an annual volume of approximately 70 million gallons. (A. 130) Petrol Stops was supplied by the defendant Armour Oil, and Armour, in turn, was supplied by the defendants Douglas and Gulf. (A. 136) Gulf was named as a co-conspirator in the government's Bill of Particulars. (R.A. 3) The focus of the antitrust violations charged in *Petrol Stops* were the States of California, Oregon, and Washington. (A. 138, 140-141) The antitrust violations alleged in the *Petrol Stops* complaint specifically included the charges:

> The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline, have combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in California, Oregon, and Washington. (A. 140-141, para. 16K)

and

> The defendants and their co-conspirators have combined and conspired to fix, raise and maintain the price of gasoline charged independent marketers of gasoline, including the plaintiff. (A. 141, para. 16N)

The complaint also charged the defendants and their co-conspirators with engaging in predatory marketing violations on the sale of gasoline with the specific intent of controlling the prices of their independent competitors including the plaintiff. (A. 141-142, paras. 16 0-R, 16T)

The complaint in *Gas-A-Tron* contained similar allegations but focused on the marketing of gasoline in Tucson, Arizona. (A. 149, 155-157) Gas-A-Tron and Coinoco, as in the case of Petrol Stops, were engaged in the retail distribution of gasoline as independent marketers. (A. 149-150) Gas-A-Tron and Coinoco marketed gasoline through 28 retail units and had an annual sales volume in excess of 13 million gallons. (A. 149-150) The alleged violations in *Gas-A-Tron* specifically included the claim the defendants and their co-conspirators had combined and conspired "to fix and control the price at which independent marketers purchased gasoline for resale in Tucson, Arizona." (A. 158, para. 15 L; A. 160, paras. 15 Q (9) & (10). The complaint in *Gas-A-Tron* also charged the defendants and their co-conspirators with predatory marketing violations

in the sale of gasoline for the purpose of controlling the gasoline prices of independent marketers at wholesale and retail in the Tucson market. (A. 155-160, para. 15)

The indictment in *United States v. Phillips, supra,* charged Douglas and Phillips, four other named defendants and unnamed co-conspirators with a "combination and conspiracy . . . to increase, fix, stabilize and maintain the price of rebrand gasoline" in the states of California, Oregon, Washington, Nevada and Arizona. (A. 121) The indictment defined "rebrand gasoline" as gasoline "sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner." (A. 118) The indictment charged the defendants "sold rebrand gasoline . . . to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public." (A. 120) The indictment, thus, charged the defendants and their co-conspirators had engaged in a price fixing conspiracy at different distribution levels in the marketing of "rebrand gasoline" including the sale of "rebrand gasoline" to retail marketers, and the defendants told the district court, "It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, ..." (A. 57)

The plaintiffs as "independent" marketers (A. 139, 141) market gasoline at retail gasoline stations under their own brand name. In terms of the indictment they are retailers of "rebrand gasoline."

The indictment and complaints charged the gasoline buying prices of such retailers were fixed. The combination and conspiracy charged in the criminal indictment was not identical to all the antitrust violations charged in *Gas-A-*

Tron and Petrol Stops. The price fixing conspiracy charged in the indictment, however, was included in the price fixing violations alleged in the civil complaints and evidence supporting the price fixing conspiracy charged in the indictment would be relevant not only to those specific violations, but to other predatory violations charged in the civil complaints.

C. There Was No Reason for Continued Secrecy

The limited disclosure of grand jury materials sanctioned under what the court of appeals characterized as a "stringent" protective order did not violate any policy supporting grand jury secrecy. There was simply no reason for secrecy. The criminal proceedings had concluded. The grand jury transcripts had already been disclosed to corporate employers. (A. 100, 108) Disclosure was limited to attorneys and use of the materials was limited to impeachment, refreshing recollection, and testing credibility. (A. 2, 48-49) If a witness who testified before the grand jury testified truthfully in the antitrust actions, there was no added risk of retaliation by the disclosure authorized, and correspondingly, no impediment to full disclosure before future grand juries. The government informed the court that a sufficient "particularized need" for the disclosure requested had been demonstrated and the defendants who had the materials never suggested to the court that their disclosure would raise any actual additional risk of retaliation.

The defendants in their brief for the first time argue the disclosure ordered endangered another interest sheltered by grand jury secrecy—the need to protect an innocent accused from exposure of a prior criminal investigation. This argument was not made to the lower courts.

The defendants never suggested that the materials in their possession actually raised any such risk. The argument, moreover, is predicated on a faulty premise. The defendants' argument, as stated in their brief, is based on the assumption the disclosure ordered encompassed "the entire text of grand jury transcripts." (Petitioners' Br. at 13-14, 26, 27) The district court did not order the disclosure of the entire text of the grand jury transcripts. Only the transcripts of the testimony of employees and former employees of the defendants that had been disclosed to the defendants were ordered produced under the court's order. (A. 48-49) Rule 16 of the Federal Rules of Criminal Procedure insures that such disclosure to corporate employers does not endanger the interest of any innocent accused by providing only those portions of employee witness transcripts that are "relevant" to the offense charged are to be released. The defendants are not innocent accused, and if the grand jury transcripts of their employee witnesses contained accusations against any person exonerated by the grand jury, those portions would not be disclosed to the defendants in the first place.

D. The Grand Jury Materials Were Necessary to Contradict the Defendants' Sworn Testimony Categorically Denying Any Price Related Conversations or Communications

The defendants denied the alleged price fixing violations in *Gas-A-Tron* and *Petrol Stops.* The defendants, moreover, each denied under oath in answers to interrogatories ever having any conversation or communication with each other or any other major oil company "relating to gasoline prices or gasoline market conditions" and accordingly refused to identify any documents relating to any such conversations or to specify the participants or

substance of any such conversation or communication. (A. 83-85) The grand jury transcripts in the defendants' possession might well contradict these answers. Indeed, the Bill of Particulars filed by the government in *United States v. Phillips, supra,* claimed there were a legion of communications and conversations concerning gasoline prices and gasoline market conditions among the defendants in *United States v. Phillips, supra,* including over 11 specific conversations between Douglas and Phillips. (R.A. 8, 12, 17, 18, 21, 23-25, 28)[3]

Finally, the protective order of the district court, by limiting the use of the disclosed grand jury materials to impeachment, refreshing recollection, and testing credibility, guaranteed the materials would be used only for the "particularized need" of attacking or testing credibility.

[3] The pertinent portions of the Bill of Particulars are set forth in the Appendix to this Brief. The Bill was not formally made a part of the record before the district court on plaintiffs' 6(e) petition, but was part of that district court's records having been filed in *United States v. Phillips, supra.* The court of appeals referred to the Bill of Particulars in its opinion. (A. 7) The court of appeals under settled authority could refer to matters not formally in the record before the lower court which were subject to judicial notice. *See, Wells v. United States,* 318 U.S. 257, 260 (1943) (". . . [T]he Government's brief points out that petitioner, before his application to the district court in this proceeding, had unsuccessfully sought release from custody in two habeas corpus proceedings, of which the federal courts may take judicial notice. . . . We cannot say that the district court in this case was unfamiliar with those proceedings, merely because they do not appear in the record before us."); *Moore v. Estelle,* 526 F. 2d 690, 694 (5th Cir. 1976) ("In considering this habeas corpus appeal we take judicial notice of prior habeas proceedings brought by this appellant in connection with the same conviction. . . . This includes state petitions, . . . even when the prior state case is not made a part of the record on appeal."); *United States v. Merrick Sponsor Corp.,* 421 F.2d 1076, 1079, n.2 (2nd Cir. 1970) ("While this judgment of foreclosure was not part of the original record filed by the parties in this court, we can take judicial notice of it."); *St. Paul Fire and Marine Insurance Co. v. Cunningham,* 257 F.2d 731 (9th Cir. 1958) (". . . while the record in the instant case does not contain information as to when the appeal was taken, or the date of dismissal of the appeal, we get that information by taking judicial notice thereof as it appears in the records of the Superior Court of Mendocino County, California, and the District Court of Appeal."); *Cf. Landy v. Fed. Deposit Ins. Corp.,* 486 F.2d 139, 151 (3rd Cir. 1973); *Travis v. Pennyrile Rural Electric Cooperative,* 390 F.2d 726, 729 (6th Cir. 1968).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in granting private antitrust plaintiffs access under a "stringent" protective order to relevant grand jury materials already in their adversaries' possession.

"Particularized need" is still the test of access to grand jury materials. *Dennis v. United States,* 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958). Grand jury secrecy, however, is not an end in itself. The "particularized need" test requires a balancing of reasons supporting secrecy against those favoring disclosure. *Dennis v. United States, supra,* at 871-872 & nn. 17 & 18. Under this Court's decisions the balancing process is a relative one; as the reasons for continued secrecy diminish, the reasons for disclosure need not be as compelling. *Dennis v. United States, supra,* at 872.

The courts below properly applied the test of "particularized need". The Ninth Circuit in accord with the overwhelming trend of authority applied a standard of "relative need" and held a plaintiff in a private antitrust action was not required to demonstrate a great need to gain access to grand jury materials once the materials had been disclosed to corporate employers, and the plaintiff's use of those materials was limited to the purpose of attacking and testing credibility. This trend of lower court authority is not only persuasive precedent, it represents the informed experience of the lower courts who are charged with the responsibility of reconciling the competing interest of secrecy and truth in the administration of justice.

Why shouldn't the district court have granted access to these grand jury materials? There was no reason for continued secrecy. The termination of the criminal proceeding had eliminated most of the reasons for secrecy. The principal risk of retaliation had been realized by the disclosure of employee transcripts to their employers. The transcripts were still in the possession of the defendants without restriction as to the defendants' further disclosure to their sister oil companies. There was no additional risk of retaliation from disclosure to plaintiffs' counsel who were not only under a court order, but a professional obligation only to use the materials in the litigation for issues of credibility. If witnesses testified truthfully, the limited access granted raised no additional risk of retaliation.

The defendants' argument the access granted raised risk to any innocent accused is specious. Neither the government nor defendants ever suggested that the grand jury materials in their possession actually raised any such risk. The defendants' whole argument is premised on the false claim that the court ordered the production of the entire grand jury transcript. The court only ordered the production of grand jury transcripts disclosed to the defendants under Rule 16 of the Federal Rules of Criminal Procedure and that rule guarantees that only portions of transcripts "relevant" to the offense charged shall be disclosed.

The grand jury materials are relevant to the price fixing and predatory antitrust violations charged in the plaintiffs' complaints. If the plaintiffs only proved the offense charged in the indictment, they would, under their civil complaints, be entitled to rely on that claim of liability. There is a strong inference that the grand jury materials support the offense charged in the indictment and neither

the government nor the defendants have ever suggested they do not. If the materials are relevant to the offense charged in the indictment, they are also relevant to the allegations of price fixing and predatory pricing included in the civil complaints.

The government was correct in conceding the plaintiffs had made a sufficient showing of "particularized need." The proof of whether a defendant participated in a price fixing conspiracy is generally based on the defendant's price related conversations or communications with competitors, such proof is largely in the hands of the defendant and the defendants' employees. The defendants, while in the possession of their employees' grand jury transcripts, testified in answers to interrogatories they had not had any price related conversations or communications with each other or any other major oil company, including Gulf, an indicted co-conspirator and civil defendant. The plaintiffs are entitled to the same opportunity to impeach this critical testimony as they are to impeach the testimony of any individual witness. The grand jury materials might well contradict the defendants' sworn testimony, a classic need for the use of grand jury materials.

Where there is no further reason for grand jury secrecy, a protective order that limits the use of grand jury materials to the purpose of attacking or testing credibility independently satisfies the "particularized need" requirements of necessity for the use of grand jury materials. Grand jury materials are a unique source in the search for accurate and truthful testimony and the use of such materials for credibility purposes has long been recognized and approved by this Court. *Procter & Gamble, supra.* Any further requirement for access beyond the protective order itself would not further the ends of grand

jury secrecy and would only impede the just disposition of civil litigation. Can any requirement for access reasonably be imposed that assures grand jury transcripts will in fact be useful for the purpose of attacking or testing credibility other than giving counsel the opportunity to use them for that limited purpose? If access is delayed until trial, the plaintiffs would be deprived of the opportunity to use the materials against witnesses who may only be available for deposition. Certainly it would be impracticable to require a showing of contradiction before access was granted and this Court has already rejected any such requirement. *Pittsburgh Plate Glass Co., supra. In camera* inspection places the court rather than counsel in the adversarial role of determining whether the materials are in fact useful for attacking or testing credibility and this Court has already rejected any such requirement. *Dennis v. United States, supra.* A requirement that grand jury witnesses be deposed in the civil litigation before access to their grand jury transcripts is granted would only result in the delay of two depositions rather than one; for at some point only adversary counsel can determine whether a witness' prior testimony is useful for the purpose of impeachment.

The disclosure authorized furthers the public interest in the enforcement of the antitrust laws and is consonant with the "growing realization" that equal access between antitrust adversaries to grand jury materials sheltered by a protective order limiting use for issues of credibility is the proper reconciliation between the needs of secrecy and the search for the truth.

The district court below, as the district court charged with the supervision of the grand jury, was clearly cast with the authority if not the exclusive authority to rule on

petitions for access to grand jury materials under Rule 6(e). Beyond the question of power the district court charged with grand jury supervision was the court that should rule on access to grand jury materials, for that court is the court that must exercise responsibility for the protection of the public interest relating to grand jury secrecy. The defendants are simply wrong in contending that the court in which the private antitrust actions are pending can deal as adequately with the needs of grand jury secrecy as the court charged with the supervision of the grand jury. Certainly the district court charged with the supervision of the grand jury must exercise that responsibility during the pendency of the criminal proceeding, but its responsibility does not end there. It is the only court with access to the government employees directly responsible for the criminal prosecution, and that access can be important in determining whether there is any need for further secrecy. Only the government personnel in charge of the prosecution can know whether there are particular risks of retaliation, risks to an informant or agent which require further protection through the maintenance of secrecy. The interest of secrecy, moreover, will be better served if the responsibility for secrecy is centered in one district and not fragmented by the happenstance of civil litigation. Every lower court that has considered the issue has held that the district court charged with supervision of the grand jury is in the best position to determine whether there is any further interest in grand jury secrecy and no court has decided an application for access to grand jury materials without the prior approval of the district court with supervisory power over the grand jury.

The district court charged with the supervision of the grand jury is also fully capable of determining whether the grand jury materials in question are relevant to the

antitrust actions. The task is not formidable, and one to which district courts are accustomed. The relevancy of grand jury materials is determined just as any question of relevancy for the purpose of discovery, by the claims and defenses asserted in the private antitrust actions. District courts other than the district in which the action is pending frequently determine issues of relevancy for the purposes of discovery. Under Rule 45 of the Federal Rules of Civil Procedure, district courts are required to make determinations of relevancy for the purpose of ruling on deposition subpoenas. Rule 45(d)(1), Federal Rules of Civil Procedure.

Access to grand jury materials for the sole purpose of attacking or testing credibility raises no issues which compel reference of the plaintiffs' petition to the district court in which the antitrust actions are pending. In any event, the district court below offered to make inquiry of the district court in which the antitrust actions were pending to determine whether the judges assigned to those actions had any objection to the district court below proceeding to rule on plaintiffs' 6(e) petition, if the defendants desired the court to do so, but the defendants expressed no such desire. The district court was well within its discretion having made that offer to rule on plaintiffs' Rule 6(e) petition particularly when the access granted under its protective order only permitted use of the grand jury materials in the private antitrust actions for the purpose of attacking or testing credibility and thus did not in any way jeopardize the Arizona district court's control of the civil litigation.

The district court not only properly applied the test of "particularized need" in ruling upon plaintiffs' 6(e) petition, the defendants to a concluded criminal proceeding have no standing to challenge the district court's order

that the government provide access to grand jury materials. While the circuits are divided on the question of standing, grand jury secrecy is a matter of public interest not private right. The government is the party charged with the adversarial responsibility in protecting the public interest in grand jury secrecy and it would unreasonably burden the administration of Rule 6(e) to hold that defendants or grand jury witnesses to a concluded criminal proceeding have private standing to challenge petitions for access to grand jury materials.

ARGUMENT

I

THE COURTS BELOW PROPERLY APPLIED THE TEST OF "PARTICULARIZED NEED"

A. This Court Has Approved A "Relative Need" Analysis In Applying The Test Of "Particularized Need"

This Court in a triumvirate of decisions has considered the standards for access to grand jury materials "preliminarily to or in connection with a judicial proceeding" under Rule 6(e) of the Federal Rules of Criminal Procedure. *Dennis v. United States,* 384 U.S. 855, 870 (1965); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958). (The issue of access arose under Rule 34, Federal Rules of Civil Procedure, but this Court has treated the decision as being equally applicable to the arguments of 6(e). *Dennis v. United States, supra,* at 869-70).

In *Procter & Gamble* this Court rejected pretrial disclosure of an entire grand jury transcript to civil antitrust defendants for general discovery purposes where the only

need for disclosure advanced was the availability of the transcript to the government in the preparation of its case. *See, Dennis v. United States, supra,* at 869. The next year the Court affirmed a trial court's denial of access to a key witness's grand jury testimony in a criminal trial where the defendants insisted without any showing of need they were entitled to the transcript as a matter of right and where there was other "'overwhelming'" proof of the offense charged. *See, Dennis v. United States, supra,* at 869. Seven years later the Court, accepting "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice," rejected a trial court's denial of access to the grand jury transcripts of key government witnesses in a criminal case. *Dennis v. United States, supra,* at 870[4].

These cases, while establishing general principles controlling access to grand jury materials are not squarely in point. In *Procter & Gamble,* the transcripts had not previously been disclosed to the witnesses' corporate employers, and the entire grand jury transcript was requested for general discovery purposes. The Court stated that disclosure of witnesses' testimony to employers presented a real risk of retaliation and a valid reason for continued secrecy. The disclosure, moreover, was for general discovery purposes, and the Court itself drew a distinction between the use of grand jury materials as a substitute for discovery rather than their use for the particularized purpose of attacking or testing credibility. *See, United States v. Procter & Gamble Co., supra,* at 683. *Pittsburgh Plate Glass Co.* and *Dennis* were both criminal cases and while criminal defendants and civil litigants have a common

[4] The lower courts have regarded *Dennis* as having overruled *Pittsburgh Plate Glass Co. United States v. Youngblood,* 379 F.2d 365 (1967); *Allen v. United States,* 390 F.2d 476 (1968).

interest in truthful and accurate testimony, the risk of personal liberty may make the interest of the criminal defendant more acute. Access to the testimony of prosecution witnesses, moreover, is now governed by the Jencks Act as amended in 1970 which requires disclosure without a showing of "particularized need." 18 U.S.C. § 3500(a), (e)(3).

These three decisions are nevertheless important, because they represent this Court's evolution of the test of "particularized need." The test of "particularized need" was first formulated in *Procter & Gamble* and the Court in that decision explicitly sanctioned as examples of "particularized need" the use of grand jury transcripts for the purpose of attacking or testing credibility. *United States v. Procter & Gamble Co., supra,* at 683. In *Pittsburgh Plate Glass Co.* the Court affirmed the "particularized need" test and held that a criminal defendant had no absolute right of access. Mr. Justice Brennan dissented in *Pittsburgh Glass Co.* in an opinion in which three other justices joined. The dissent adhered to the "particularized need" test (*Pittsburgh Plate Glass Co. v. United States, supra,* at 405), but forcefully argued the proper application of that test required (1) an analysis of whether there was any reason for further secrecy, and (2) an analysis of whether any further reason for secrecy was outweighed by the need for disclosure. The dissent, in short, approved a "relative need" analysis in the application of the "particularized need" test. The dissent recognized that in determining "particularized need" the competing considerations of secrecy and disclosure were relative and as the need for further secrecy diminished, the requisite need to warrant disclosure could become less compelling. The method of analysis utilized by the dissent in *Pittsburgh Plate Glass Co.* is important, because it was explicitly adopted by the

court in *Dennis*. *Dennis* not only cited Mr. Justice Brennan's critical analysis of the reasons for further secrecy with approval (*Dennis v. United States, supra,* at n. 18), but the Court itself employed a "relative need" analysis in requiring disclosure.

B. The "Relative Need" Test Employed By The Ninth Circuit Below Is Not A Test Of "Slight Need" And Is In Accord With The Overwhelming Trend Of Authority

The Ninth Circuit in the opinion below held a showing of "particularized need" was required. The circuit did not adopt a "slight need" standard as claimed by the defendants (Petitioners' Br. at 19-21), but a standard of "relative need"—"'[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need.'" (A. 5) The circuit found, in applying its standard of "relative need", the public interest in further secrecy in terms of the disclosure authorized was "lightly weighted." (A. 7) The circuit reached that conclusion on the ground that (1) the criminal proceeding had been concluded, and (2) the grand jury transcripts of the defendants' employees had already been disclosed to the defendants.

The Ninth Circuit's decision is in accord with the overwhelming trend of lower court authority. Case after case in the lower courts have granted private antitrust plaintiffs access to relevant grand jury materials when (1) the criminal proceedings have concluded, (2) the materials have already been disclosed to the plaintiff's adversaries, and (3) a protective order restricts the use of such

materials to impeachment, refreshing recollection, and testing credibility. *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert. denied,* 434 U.S. 889 (1977); *U. S. Industries, Inc. v U. S. District Court,* 345 F.2d 18 (9th Cir. 1965); *Little Rock School District v. Borden, Inc.,* 1978-1 Trade Cases (CCH) ¶ 62,020 (E.D. Ark. Apr. 28, 1978) (grand jury had not even concluded deliberations, but transcripts had already been released to defendants); *In re Sugar Antitrust Litigation,* 1977-2 Trade Cases (CCH) ¶ 61,808 (N.D. Cal. Dec. 22, 1977); *In re Folding Carton Antitrust Litigation,* 1977-2 Trade Cases (CCH) ¶ 61,807 (N.D. Ill. Jun. 30, 1977); *In re Arizona Dairy Products Litigation,* 1976-2 Trade Cases (CCH) ¶ 61,177 (D. Ariz. Nov. 22, 1976) (defendants had not even obtained the transcripts); *Boise City, Idaho v. Monroe, Inc.,* 1976-2 Trade Cases (CCH) ¶ 61,178 (D. Idaho Nov. 16, 1976) (no protective order); *In re Sugar Antitrust Litigation,* 1976-1 Trade Cases (CCH) ¶ 60,934 (N.D. Cal. Jun. 10, 1976); *United States v. Saks & Co.,* 1976-1 Trade Cases (CCH) ¶ 60,741 (S.D.N.Y. Feb. 16, 1976); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases (CCH) ¶ 60,910 (D. Ariz. Dec. 2, 1975); *In re Toilet Seat Antitrust Litigation,* 1975-2 Trade Cases (CCH) ¶ 60,557 (E.D. Mich. Oct. 20, 1975); *In re Cement-Concrete Block Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *State of Connecticut v. General Motors,* 1974-2 Trade Cases (CCH) ¶ 75,138 (N.D. Ill. Apr. 29, 1974) (protective order not limited to impeachment, refreshing recollection, and testing credibility). These decisions conclude that once the transcripts have been disclosed to corporate employers there is no longer any significant need to guard against the risk of retaliation and any such residual risk can be sheltered by the terms of the protective order. These decisions find that it is only fair if all sides have equal access to relevant information and a protective

order proscribing the use of the disclosed materials assures they will be used only for the "particularized need" of attacking or testing credibility. These decisions hold that disclosure in these circumstances serves the interest of justice in securing accurate and truthful testimony without compromising the public interest in grand jury secrecy.

The only lower court decision contrary to this uniform line of authority is the Fifth Circuit's decision relied upon by the defendants in *State of Texas v. United States Steel Corporation*, 546 F.2d 626 (5th Cir. 1977) *cert. denied*, 434 U.S. 889 (1977). In *United States Steel Corporation*, the Fifth Circuit reversed an order granting access holding that the prior disclosure to corporate employers standing alone did not establish "particularized need" and requiring the plaintiffs to draw "a finer bead." The foundation of the Fifth Circuit's decision was its rejection of the argument that disclosure of grand jury transcripts to a corporate employer raises the risk of retaliation and hence such prior disclosure eliminates the principal reason for further secrecy. Specifically, the circuit stated,

> This argument ignores the usual case in which corporate spokesmen . . . appear before a grand jury representing and speaking for the corporation, indeed in a real sense are the corporation on such an occasion. When the corporation, in such a case, acquires transcripts of its spokesmen's testimony, it acts in a capacity little different from an individual defendant who seeks his own transcript. *State of Texas v. United States Steel Corporation, supra*, at 630.

The Fifth Circuit's rejection of the argument that disclosure to corporate employers raises the risk of retaliation that will chill full disclosure to future grand juries is contrary to the risk of corporate reality, has been uniformly repudiated by all other lower federal court decisions on

point, and has been repudiated by this Court's decision in *Procter & Gamble* which premised the creation of the test of "particularized need" on that very risk of retaliation. ***United States v. Procter & Gamble Co., supra,*** at 682.

The overwhelming trend of lower court authority supporting the decision below represents persuasive precedent, but perhaps even more importantly it represents the cumulative experience of courts charged with the day-by-day responsibility of reconciling the competing interest of secrecy and disclosure. There is no question that in antitrust cases, access to grand jury transcripts has been useful if not vital in securing accurate and truthful testimony; as counsel in the electrical cases wrote, "Amazingly enough, . . . once the witnesses learned that their grand jury testimony was to become an open secret, their memories rapidly improved. Often the clarity of the testimony miraculously improved without any review by the witness of his grand jury transcript." Hanley, *Obtaining and Using Grand Jury Minutes In Treble Damage Antitrust Actions*, 11 ANTITRUST BULLETIN 659, 671 (1966). On the other hand, there has not even been a suggestion in the decided cases or secondary comment that the access granted to grand jury transcripts in private antitrust litigation has in any way compromised the viability of the institution of the federal grand jury.

C. The Access Granted Under The Protective Order Of The District Court Did Not Invade Any Of The Reasons For Grand Jury Secrecy

Since the criminal proceedings in *United States v. Phillips, supra,* had concluded, the only reasons for grand jury secrecy remaining were to avoid the risk of retaliation with a view toward encouraging future grand jury

disclosure and to protect any innocent accused who may have been exonerated by the grand jury. Neither of these reasons were endangered in this case[5]. The access granted under the court's order raised no risk of retaliation or any risk of exposure to any innocent accused and the government and the defendants who had the materials in their possession have never suggested that those materials raise any such risk.

The district court's protective order only granted plaintiffs access to documents produced by defendants to the grand jury and grand jury transcripts of the defendants' employees and former employees already disclosed to the defendants pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The transcripts were still in the defendants' possession without any restriction as to their use.

Since the transcripts in question had already been disclosed to the defendant-employers, there was no further risk of retaliation from that quarter by reason of the district court's order. It is true competitors and customers may also be a source of retaliation, but while there was nothing to prevent the defendants from making any such disclosure, the district court's protective order prevented

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[5] The documents produced by the defendants do not raise the same considerations of grand jury secrecy that transcripts of grand jury witnesses do. Although some secondary comment has included documents produced pursuant to grand jury subpoena within the category of grand jury materials (68 J. Crim. L.C. & P.S. 399-400 (1977), a question may be raised as to whether such documents are grand jury materials subject to the shroud of grand jury secrecy. *In re Cement-Concrete Block Chicago Area, Grand Jury Proceedings*, 1974-1 Trade Cases (CCH) ¶ 75,130 (N.D. Ill. Jun. 25, 1974) ("'The [documents] exist as an entity apart from the grand jury; the information contained therein does not reflect upon and is not inextricably intertwined with the deliberation or work of the grand jury.'") *Id* at ¶ 75, 132. The only justification for according such documents the protection of grand jury materials would be that the documents produced pursuant to grand jury subpoena may disclose a pattern of grand jury investigation.

plaintiffs' counsel from doing so. The protective order of the district court was not only enforced by the court's power of contempt, but by plaintiffs' obligations of professional responsibility. CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule, DR 7-102 paras. (A) (7) & (8). The protective order of the district court limited the use of the grand jury materials to attacking or testing credibility. If witnesses before the grand jury testified truthfully at their depositions or trial, the disclosure made raised no additional risk of retaliation beyond their own testimonial obligation, for as Wigmore observes, "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony can not possibly bring to him any harm . . . which his testimony . . . does not equally tend to produce." 8 WIGMORE, *Evidence* § 2362, at 736 (McNaughton rev. 1961) The disclosure granted under the district court's protective order raised no additional risk of retaliation.

The defendants for the first time suggest in their brief that the access granted endangered another reason for grand jury secrecy, the need to protect the innocent accused from exposure. The defendants' contention is premised, as it must be, on the false contention that the district court ordered the production of the entire grand jury transcript. (Petitioners' Br. at 13, 26, 27.) The district court did not order access to the entire grand jury transcript, it only ordered access to the grand jury transcript that had been disclosed to the defendants in *United States v. Phillips, supra,* under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. That rule specifically provides that only those portions of the grand jury transcript of the defendant-employees that are "relevant" to the offense charged shall be disclosed to employer-defendants. Consequently, even if this grand jury exon-

erated some innocent accused or exonerated the defendants of violations that were not charged in the indictment, transcripts relating to those circumstances were never disclosed to the defendants in the first place and their exposure would not be jeopardized by the court's order. There was simply no reason in terms of the policies sheltering grand jury materials why these materials should not have been disclosed under the protective order of the district court.

D. The Grand Jury Materials Were Relevant To The Price Fixing And Predatory Pricing Antitrust Violations Alleged In The Civil Complaints

The plaintiffs are independent retail marketers of gasoline. They purchase and resell gasoline under their own brand names. or in terms of the indictment, market rebrand gasoline. The complaint in *Petrol Stops* specifically alleged Petrol Stops' primary supplier of gasoline was in turn supplied by Douglas and Gulf, an indicted co-conspirator. The civil complaints included the charge the defendants had combined and conspired to fix the price of gasoline sold to independent marketers, including the plaintiffs. Both complaints further charged the defendants with engaging in various predatory marketing violations for the specific purpose of controlling the gasoline prices of independent marketers, including the plaintiffs.

The indictment charged the defendants with engaging in a conspiracy to fix the price of rebrand gasoline, including the price of gasoline sold to independent retailers, such as the plaintiffs, in the same area and at the same time as the price fixing conspiracies charged in the civil complaints.

The antitrust violations and parties charged in the civil complaints were not identical with the violation or parties charged in the indictment. The price fixing violation charged in the indictment, however, was included in the price fixing violations alleged in the civil complaints. If the plaintiffs did no more than prove they were injured by reason of the price fixing violation charged in the indictment, they would be entitled to recover against the defendants under that theory based on their civil antitrust complaints.

Identity is not an essential requirement of relevancy. The parties and the violations charged do not have to be the same in order for the grand jury materials in the indictment to be relevant to the civil claims. The indictment need only be included within the civil claims or a material element of such claims in order to demonstrate that the grand jury materials are relevant. Relevancy is established on the premise that the grand jury materials support the indictment, as the circuit said, ". . . there is a strong inference that the grand jury materials support the government's charges." (A. 7) If the grand jury materials support the offense charged in the indictment, and that offense is included in the claims made in the civil complaint or is a material component of such claims, the grand jury materials are relevant.

Even if the defendants have standing, the government is the party primarily charged with protecting the public interest represented in grand jury secrecy. The government, of course, was cognizant of the contents of the grand jury materials in question and represented to the court that the plaintiffs had made a sufficient showing of "particularized need". While the government's concession is not binding on the district court, it certainly corroborates the district court's determination of relevancy.

E. The Plaintiffs Sufficiently Demonstrated A "Particularized Need" For The Grand Jury Materials

The government was correct in conceding the plaintiffs had made a sufficient showing of "particularized need". The antitrust violations alleged in the civil complaints included the charge that the defendants had engaged in a price fixing conspiracy. Participation in such a conspiracy is normally, of course, largely in the hands of the defendants and their employees. *Poller v. CBS,* 368 U.S. 464 (1962). The defendants denied the charge of price fixing and the plaintiffs propounded interrogatories to the defendants asking whether the defendants had engaged in any price-related conversations or communications with each other or any other major oil company. The defendants, who are required under Rule 33, Federal Rules of Civil Procedure, to furnish "such information as is available", each categorically denied, under oath, having had any such conversation or communication. (A 83-85) The defendants, with the grand jury materials in their possession, stood upon this testimony. *Cf.,* Rule 26(e), Federal Rules of Civil Procedure. The defendants are bound by the same testimonial obligation as an individual witness, and the plaintiffs are entitled to the same opportunity for impeachment.

Since the grand jury materials, that is, the documents produced by the defendants to the grand jury, and the testimony of the defendants' employees to the grand jury might well contradict their answers to interrogatories, plaintiffs' access to the grand jury materials was necessary to afford the plaintiffs an opportunity to impeach. The opportunity to impeach is, of course, a classic example of "particularized need". *Procter & Gamble, supra* at 683. The likelihood that these grand jury materials would

serve as a basis for such impeachment was substantiated by the Bill of Particulars in *United States v. Phillips, supra.* The government in the Bill of Particulars listed over 11 specific conversations between Douglas and Phillips that would have been precisely covered by the plaintiffs' interrogatories.

F. The Protective Order Restricting The Use Of Grand Jury Materials For The Purpose Of Attacking And Testing Credibility Satisfied The Requirements Of Necessity For The Use Of Grand Jury Materials

Where there is no further reason for grand jury secrecy the requisite necessity for the use of grand jury materials is satisfied by a protective order restricting use for the purpose of attacking or testing credibility. The district court's protective order, by restricting the use of the grand jury materials by counsel for the sole purpose of attacking or testing credibility, properly balanced the interests of secrecy and disclosure. The use of grand jury materials for the purpose of impeachment, refreshing recollection, and testing credibility have long been recognized as examples of the "particularized need" for the use of grand jury materials. *Procter & Gamble, supra.* The use of such materials for credibility purposes serves the interest of justice in securing accurate and truthful testimony. Grand jury materials are a unique source for achieving these goals. The investigatory resources of the government are greater than civil litigants and while theoretically the testimonial obligation before the grand jury and in civil litigation is the same as a practical matter, witnesses tend to be far more forthcoming in their grand jury appearances. How many perjury prosecutions result from testimony in private antitrust litigation?

A protective order that restricts the use of grand jury materials by counsel for the purpose of attacking or testing credibility satisfies any valid requirement that such materials are necessary for that purpose, for it is the only practical alternative for assuring that grand jury materials are necessarily useful for the purpose of cross-examination. If there is no further reason for secrecy and if the use of relevant grand jury materials for credibility purposes serves the search for accurate and truthful testimony, why should any additional requirement of necessity be imposed for access to grand jury materials beyond a protective order that guarantees the materials will only be used for the purpose of attacking or testing credibility? Any further requirement for access will only hedge grand jury secrecy with artificial barriers that have either already been rejected by this Court or that will merely delay the ultimate use of the materials for the recognized need of cross-examination.

Basically there are only five alternatives for determining whether relevant grand jury materials are necessary for the purpose of attacking or testing credibility—(1) access can be denied until a witness who testified before the grand jury testifies at trial, (2) access can be denied until there is an independent showing of contradiction or lack of recollection, (3) access can be denied unless the court determines by *in camera* inspection the grand jury materials will in fact be useful for purposes of cross-examination, (4) access can be denied until a grand jury witness has first been deposed in the civil litigation, and (5) access can be granted to counsel under a protective order that limits the use of grand jury materials solely for the purpose of attacking or testing credibility.

If access is delayed until trial, the plaintiffs will be deprived of the opportunity of using the materials for the

purpose of attacking or testing the credibility of witnesses that are only available by deposition, and cross-examination based on such materials will not be available to counter attempts at summary disposition. This Court has already recognized that it would be impracticable to require a showing of contradiction before access is granted. *Pittsburgh Plate Glass Co., supra.* Such a requirement would truly put the cart before the horse. *In camera* inspection is unsatisfactory and this Court has so held. *Dennis, supra.* Counsel, and not the court, must make the adversarial determination of whether the grand jury materials are useful for the purpose of cross-examination. If prior deposition was a requirement to access, plaintiffs would ultimately gain access to grand jury transcripts and the only result would be two depositions instead of one. What purpose will be served by requiring a party to go through the process of deposition, petition, and deposition again? What further information would the court have to show that the grand jury materials are necessary for cross-examination without comparing the witness' testimony with the grand jury materials? But counsel, and not the court, should make that determination. The only practical alternative, therefore, in assuring the grand jury materials are necessary for the purpose of attacking or testing credibility is to grant counsel access and the opportunities for cross-examination under a protective order.

Congressional policy has strongly supported the private enforcement of the antitrust laws. 15 U.S.C. § 15. Just as Congress has recognized that private enforcement serves the public interest, it has provided for the private use of public enforcement which results in final adjudication on the merits. 15 U.S.C. § 16(a). A private plaintiff, however, may not take advantage of government litigation that results in *nolo* pleas or consent decrees. *Id.* Indeed,

the only practical use that private plaintiffs may gain from such government litigation is the use of grand jury materials. The use of such materials in private litigation solely for the purposes of credibility not only aids in the search for the truth and in antitrust enforcement, but materially expedites such litigation. Private antitrust litigation is necessarily complex with the attendant burdens on the administration of justice. The use of grand jury materials for credibility purposes focuses both the issues and the use of discovery and expedites the disposition of burdensome litigation.

If continued secrecy no longer serves the reasons for grand jury secrecy and if the use of grand jury materials for the purpose of cross-examination serves the interest of justice in truthful and accurate testimony as well as the public interest in effective and expeditious antitrust enforcement, then a protective order which restricts the use of grand jury materials to attacking and testing credibility independently assures the requisite necessity for the use of such materials in private antitrust litigation.

II

THE DISTRICT COURT CHARGED WITH THE SUPERVISION OF THE GRAND JURY WAS NOT COMPELLED TO REFER THE 6(e) PETITION TO THE DISTRICT IN WHICH THE ANTITRUST ACTIONS WERE PENDING

The District Court for the Central District of California was charged with the supervision of the grand jury in *United States v. Phillips, supra; United States v. Calandra*, 414 U.S. 338, 346 (1974); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D.

Pa. 1976); 18 U.S.C. § 3331, and was the proper court to rule on this Rule 6(e) petition for access to grand jury materials.

The district court for the district in which the grand jury sits and which is charged with the supervision of the grand jury clearly is at least "a" district court if not "the" only district court that is empowered to grant access to grand jury materials "preliminary to and in connection with a judicial proceeding" under Rule 6(e). *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C 1957)[6]. Any other construction would make no sense, for absent prior disclosure of grand jury materials the district court in which the grand jury sits may be the only court with the power to grant access to such materials.

Beyond the question of power, the district court charged with the supervision of the grand jury is the proper court to rule on 6(e) petitions, for it is that court that must exercise responsibility for the protection of the public interests relating to grand jury secrecy. There are several reasons why the district court charged with supervision of the grand jury has that responsibility. Even the

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[6] This petition arose under Rule 6(e) prior to that Rule's amendment effective October 1, 1977. This Court originally proposed such an amendment on April 26, 1976. 425 U.S. 1159 (1976). Congress, after postponing the effective date of that amendment, Pub. L. No. 94-349, § 1, 90 Stat. 822 (1976) pursuant to the Rules Enabling Act, 18 U.S.C. § 3771, amended this Court's proposal on July 30, 1977, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977) and enacted Rule 6(e) in its present form, making it effective on October 1, 1977. While the amendment as enacted by Congress changed the article "the" to "a" in referring to the court which could direct disclosure "preliminarily to or in connection with a judicial proceeding . . .", plaintiffs believe that considerations of policy and not changes in articles should govern the decision of this Court, and the legislative history indicates that this amendment was ". . . not intended to change any current practice with regard to [disclosure of information when '[d]irected by a court preliminary to or in connection with a judicial proceeding"] . . ." *See*, 123 CONG. REC. H7867 (daily ed. July 27, 1977) (remarks of Rep. Mann).

defendants concede that during the pendency of a criminal proceeding the district court with supervision over the grand jury must have control over questions of grand jury secrecy. (Petitioners' Br. at 36, n. 30) The court does not lose its responsibility at the conclusion of the criminal proceedings. The government is the party primarily, if not exclusively, responsible for advocating the public interest in grand jury secrecy. Only the district court with supervision over the grand jury will have access to the government employees directly responsible for criminal proceedings and such access can be important in determining whether there is further reason for grand jury secrecy. The defendants are wrong in contending that the reasons for further secrecy are merely matters of general policy. On the contrary, there may be particular risk of retaliation of which only the government agency in charge of the criminal prosecution is aware. Only the government may know the risk to an agent, an informer, or be sensitive to the fears of a particular witness. If the genuine interests of grand jury secrecy are to be served, it is important that the district court exercising responsibility for secrecy has direct access to the views of the government with regard to applications for disclosure. The interests of secrecy, moreover, will be best served if the responsibility for secrecy is centered in one district court and not fragmented by the happenstance of civil litigation throughout the district courts of the federal system. The question is not whether the district court charged with the supervision of the grand jury is "familiar" with grand jury proceedings. It is not the responsibility of a judge to monitor the grand jury. *United States v. Calandra, supra,* at 343. The question is which court should have responsibility for grand jury secrecy and whether the interests of grand jury secrecy are served by fragmenting that responsibility. The court charged with

the supervision of the grand jury is simply in the best position to determine whether there is any further interest in grand jury secrecy in applying the test of "particularized need" to a petition for access to grand jury materials and every lower court, including the court below, that has considered the issue, has so held. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978) *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978); *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert denied,* 434 U.S. 889 (1977); *In re April 1956 Term Grand Jury,* 239 F.2d 263, 272 (7th Cir. 1957); *Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra.*

The district court charged with the supervision of the grand jury is also fully capable of determining whether the grand jury materials in question are relevant to a civil antitrust case pending in another district. The determination of relevancy is not the formidable task the defendants seek to make of it. District courts determine relevancy all the time and have a peculiar expertise in doing so. Relevancy of the materials requested is simply determined by the claims or defenses asserted in the civil actions. That is how every district court determines relevancy for the purpose of discovery. *Compare,* Rule 26(b)(1), Federal Rules of Civil Procedure, with Rule 401, Federal Rules of Evidence.

The Federal Rules of Civil Procedure envision that district courts other than the district court in which the action is pending are fully capable of determining relevancy for the purpose of discovery in a pending action. Subpoenas duces tecum, in connection with the taking of depositions in districts outside of the district in which the action is pending, are, under Rule 45, committed to the

control of the district in which such subpoenas are issued and that control includes the determination of relevancy. Rule 45(d)(1), Federal Rules of Civil Procedure. Certainly, if a district court can determine relevancy in connection with a deposition subpoena, a district court can determine relevancy in connection with a 6(e) petition for access to grand jury materials.

The defendants' elaborate arguments that issues of relevancy are so complex that they can only be determined by the district in which the civil actions are pending are simply a subterfuge and untrue. There were no problems under the Manual for Complex Litigation or of judicial economy or of abuse of discovery or of the order of discovery in determining whether grand jury materials resulting in an indictment for price fixing were relevant to civil complaints, including substantially similar charges of price fixing. But finally, the answer to the defendants' lament that the district court below should have referred the matter to the district court of Arizona in which the actions were pending, is that the district court below offered to make inquiry of the district courts in which the civil actions were pending to determine whether the judges assigned to those actions had any objection to the court below proceeding, if the defendants desired the court to do so, but the defendants expressed no such desire. The district court said:

> I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

> I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here. (A. 56)

and again the court said:

> If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern. (A. 58)

and the defendants were silent. (A. 52-64)

If the defendants were really interested in having the judges for the district courts of Arizona in which the actions were pending determine whether there were any circumstances peculiar to the civil antitrust actions which warranted those courts being involved in the question of the plaintiffs' access to the grand jury materials, the defendants would have expressed that interest when invited by the court below to do so. The district court did not abuse its discretion in deciding the plaintiffs' 6(e) petition when the defendants had declined the court's invitation. The protective order, moreover, by restricting the use of the grand jury materials eliminated any conceivable risk to the Arizona district court's control of the civil litigation.

The proper reconciliation of the interest in grand jury secrecy and the need for the use of grand jury

materials will not be served by creating a maze of petitions to different courts at different times. There is no practical reason for one court to consider the interest of secrecy and another to consider the interest of relevancy or to require further petitions after each grand jury witness has been deposed to determine whether access to the witness' grand jury transcripts or other grand jury materials will be granted simply for the purpose of redeposing the witness so that the witness' credibility can be attacked and tested with the use of such materials. Long ago this Court provided that the Federal Rules of Civil Procedure should be "construed to secure the just, speedy, and inexpensive determination of every action," Rule 1, Federal Rules of Civil Procedure. The order of the district court below, unlike the circuitous route proposed by the defendants, made a material contribution to the achievement of those goals.

III

THE DEFENDANTS HAD NO STANDING TO CHALLENGE AN ORDER GRANTING ACCESS TO GRAND JURY MATERIALS UNDER RULE 6(e) AFTER CRIMINAL PROCEEDINGS HAD CONCLUDED

The defendants did not petition to intervene before the district court below, but merely appeared as self-styled "real parties in interest" in opposition to the Rule 6(e) petition. (A. 90) The plaintiffs contended the defendants had no standing to challenge the district court's order granting access to grand jury materials under Rule 6(e) after the criminal proceedings had concluded. The Ninth Circuit rejected plaintiffs' contention. (A. 2-4) The circuits are divided on the issue. The Ninth and Seventh Circuits have held that defendants to a concluded criminal

proceeding have standing to challenge an order under Rule 6(e) granting access to grand jury materials. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978), *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978); *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert. denied,* 434 U.S. 889 (1977). The Third Circuit has squarely held to the contrary. *United States v. American Oil Co.,* 456 F.2d 1043 (3d Cir. 1972).

The Third Circuit is correct. Grand jury secrecy is a matter of public interest, not private right. It would unreasonably burden the administration of Rule 6(e) to hold that defendants or grand jury witnesses to a concluded criminal proceeding have private standing to challenge petitions for access to grand jury materials. Would each grand jury witness or each defendant be entitled to notice and an opportunity to be heard every time a Rule 6(e) petition for access is filed? That type of administrative burden is unnecessary. The government as the prosecutor is the party charged with the adversarial responsibility in protecting the interest served by grand jury secrecy. Indeed, the prohibitions of Rule 6(e) only run to the government. The rule now specifically provides that only government personnel are covered by the obligations of secrecy imposed by the rule, and the district court's order as any order under Rule 6(e) was directed to the government who had possession of the grand jury materials.

The Third Circuit decision is supported by this Court's decision in *United States v. Calandra,* 414 U.S. 338 (1974). In *Calandra* this Court held a witness had no standing to invoke the exclusionary rule before a grand jury and refuse to answer questions on the ground the inquiry was

the product of an unlawful search and seizure. This Court reached that holding on the ground that the exclusionary rule was a matter of constitutional remedy rather than private right. If a witness before a grand jury lacks standing to invoke the exclusionary rule, a defendant to a concluded criminal proceeding necessarily lacks standing to raise considerations of grand jury secrecy in opposition to a petition for access to grand jury materials under Rule 6(e).

CONCLUSION

The order of the district court properly reconciled the competing interest of secrecy and truth by granting plaintiffs' counsel access to relevant grand jury materials already in the defendants' possession under a protective order restricting the use of such materials for the necessary purpose of attacking or testing credibility, and the judgment of the court of appeals, therefore, should be affirmed.

Dated this 19th day of October, 1978.

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APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* PHILLIPS PETROLEUM COMPANY and DOUGLAS OIL COMPANY OF CALIFORNIA, *Defendants.*	Criminal No. 75-377-MML BILL OF PARTICULARS

On March 19, 1975, the indictment in this case was returned naming as defendants Phillips Petroleum Company (Phillips), Douglas Oil Company of California (Douglas), Powerine Oil Company (Powerine), Fletcher Oil & Refining Company (Fletcher), Golden Eagle Refining Company, Inc. (Golden Eagle) and MacMillan Ring-Free Oil Company, Inc. (MacMillan). Powerine, Fletcher, Golden Eagle and MacMillan pled nolo contendere and have been sentenced. The defendants moved for a Bill of Particulars on May 21, 1975. The government has voluntarily agreed to provide responses to many of the

requests made by the defendants and has objected to answering others in its Memorandum filed June 11, 1975. The Court has ordered that such responses be filed, in accordance with the government's offer and objections, on or before August 29, 1975.

Following are the government's responses to the defendants' Request for Particulars based on the information available to the government at the present time and in accordance with its offer and objections. In proving its case at trial, the government will rely upon the totality of events and circumstances to evidence the combination and conspiracy charged. Among these events and circumstances are the contacts between the defendants and co-conspirators and the fact that they have performed acts which they combined and conspired to do. The government reserves the right to amend this Bill of Particulars or to file a supplemental Bill at any time, subject to such conditions as justice requires as provided in Rule 7(f) of the Federal Rules of Criminal Procedure.

Each of the defendants' requests for particulars to be answered will be set forth followed by the government's response to the specific request.

Defendants' Request A-1

1. Please identify each of the "various other corporations, firms and individuals, not made defendants" which are referred to as "co-conspirators" in paragraph 8 of the indictment (hereafter the "alleged co-conspirators").

Response to Defendants' Request A-1

The following corporations, not named as defendants in the indictment, are those referred to as "co-conspirators" as are presently known to the government.

Gulf Oil Corporation
Signal Oil and Gas Company
(now known as Burmah Oil and Gas Company)
Seaside Oil Company
(formerly a wholly owned subsidiary of Phillips, later merged into Phillips)

The following individuals are those co-conspirators, presently known to the government, through which the defendants formed, performed and furthered the offense charged in the indictment.

Co-Conspirator	Affiliation
Claude Hendrix	Phillips Petroleum Company
S. R. Lindstrom	Phillips Petroleum Company
William J. Sinclair	Phillips Petroleum Company
John Guy	Phillips (Seaside)
John J. Stanko	Douglas Oil Company of California
Donald McNutt	Douglas Oil Company of California
William L. Martin, II	Douglas Oil Company of California
George Edward Clark	Douglas Oil Company of California
George Hopwood	Douglas Oil Company of California
Russell L. Ridout	Douglas Oil Company of California
Harry R. Rothschild, Jr.	Powerine Oil Company
Peter B. Rothschild	Powerine Oil Company
Edward J. Barnes	Powerine Oil Company
Kenneth B. Galligan	Powerine Oil Company
Jack Keane	Powerine Oil Company
James S. Enge (after 3-71)	Powerine Oil Company

Walter A. Juergens	Fletcher Oil & Refining Company
Edwin H. Anderson, Jr.	Fletcher Oil & Refining Company
Larry Delpit	Fletcher Oil & Refining Company
Bertram Ault	Golden Eagle Refining Company, Inc.
Horace G. McKay	Golden Eagle Refining Company, Inc.
Frank L. Randall	Golden Eagle Refining Company, Inc.
Eugene McDaniels	MacMillan Ring-Free Oil Company
James S. Enge (until 3-71)	MacMillan Ring-Free Oil Company

The following individuals are the co-conspirators presently known to the government through whom the corporate co-conspirators participated in the offense charged in the indictment.

Individual	Affiliation
Eugene Eisemann	Gulf Oil Corporation
Herbert Wetzler	Gulf Oil Corporation
James B. Fowler	Signal Oil and Gas Company
Richard Brehme	Signal Oil and Gas Company
George Sturges	Signal Oil and Gas Company

The last known addresses of the above individuals are indicated on Appendix A attached.

Defendants' Request A-2

2. Please identify each statement, communication, act or other conduct of each alleged co-conspirator allegedly

"in furtherance" of "the offense charged" in the indictment, or by which such co-conspirator allegedly "participated" in "the offense charged" in the indictment.

Response to Defendants' Request A-2

A. General Conspiratorial Conduct Throughout the Period Covered by the Indictment

Each defendant and co-conspirator identified in Response A-1 participated in various types of conduct in the formation and furtherance of the offense charged in the indictment. Such conduct included the following: telephone conversations, informal luncheon gatherings at various restaurants in Southern California, social encounters at private clubs (such as the Jonathan Club in Los Angeles), communications carried out at trade association gatherings and clubs, other meetings, and written correspondence.

Within the period covered by the indictment, the co-conspirators and the defendants communicated information to each other during the course of the conduct described above regarding both prospective and past price movements for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. They exchanged information regarding market conditions of rebrand gasoline such as price and supply. They discussed the desirability of receiving higher prices for rebrand gasoline sold by the defendants in the Western area. They agreed with each other as to which defendants would follow a price increase on rebrand gasoline instituted by another defendant for the Western area, the order in which they would implement the increase and the date the increase would be effectuated. As each defendant raised its rebrand gasoline prices in the Western area, a co-conspirator would notify representatives of the other defendants. The co-

conspirators refused to supply new customers or sell greater than normal quantities to shared customers until all of the defendants and co-conspirators had implemented the agreed-upon price increases in the Western area.

B. Conspiratorial Conduct Prior to September 1970

Prior to September 1970, each defendant and co-conspirator participated in exchanges of information regarding projected or implemented price increases in the Western area for rebrand gasoline for the purpose of increasing, fixing, stabilizing and maintaining such prices. Exchanges were made at meetings and by telephone. All of these exchanges are currently unknown to the government, as are all the details of other exchanges. To the extent that details are available, they are set forth below.

DATE	PARTICIPANTS	PLACE
1-10-69	Wetzler (Gulf) Brehme (Signal)	Yankee Whaler
1-17-69	Wetzler (Gulf) Keane (Powerine)	Statler Hilton
2-28-69	Hendrix (Phillips) Wetzler (Gulf)	Century House
5-27-69	Keane (Powerine) Wetzler (Gulf)	Nicola's
10-29-69	Keane (Powerine) Wetzler (Gulf)	Lunch
11-21-69	Wetzler (Gulf) Brehme (Signal)	Lunch at Century House
1-21-70	Anderson (Fletcher Enge (MacMillan)	Jonathan Club
2-09-70	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club

DATE	PARTICIPANTS	PLACE
3-10-70	Anderson (Fletcher) Barnes (Powerine)	Tasman Sea San Pedro
3-12-70	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
4-08-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Lunch at Jonathan Club
4-13-70	Wetzler (Gulf) Brehme (Signal)	Lunch at Senor Pico
4-16-70	Keane (Powerine) Juergens (Fletcher) Anderson (Fletcher)	Saddleback Inn
4-20-70	Delpit (Fletcher) McKay (Golden Eagle)	Petroleum Club
4-20-70	McNutt (Douglas) Anderson (Fletcher) Barnes (Powerine)	Lakeside Country Club, No. Hollywood
4-21-70	Stanko (Douglas) McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
4-21-70	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
4-28-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
4-28-70	Keane (Powerine) Wetzler (Gulf)	Occidental Tower
4-29-70	McKay (Golden Eagle) Ault (Golden Eagle) Clark (Douglas)	Unknown
4-30-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club

DATE	PARTICIPANTS	PLACE
5-01-70	Wetzler (Gulf) Hendrix (Phillips)	Yamato
5-07-70	McDaniels (MacMillan) Delpit (Fletcher)	Lunch at Jonathan Club
5-15-70	Anderson (Fletcher) Barnes (Powerine)	Chez Edward
5-19-70	Sinclair (Phillips) Stanko (Douglas) Clark (Douglas)	Unknown
5-21-70	Anderson (Fletcher) McNutt (Douglas)	Jolly Knight Garden Grove, CA
5-22-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
5-26-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
6-05-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
6-22-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
7-02-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
7-10-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
7-21-70	Anderson (Fletcher) Enge (MacMillan)	Tasman Sea San Pedro
8-05-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
8-06-70	Clark (Douglas) Anderson (Fletcher)	Jonathan Club

DATE	PARTICIPANTS	PLACE
8-12-70	Galligan (Powerine) Juergens (Fletcher) Keane (Powerine)	King's Retreat Whittier
8-17-70	Anderson (Fletcher) Clark (Douglas) Stanko (Douglas)	Jonathan Club
8-18-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
8-19-70	Juergens (Fletcher) Fowler (Signal) Delpit (Fletcher)	Perino's
8-21-70	Wetzler (Gulf) Keane (Powerine)	Yamato
8-28-70	McDaniels (MacMillan) Delpit (Fletcher) Anderson (Fletcher)	Hollandease

In further detail, Jack Keane (Powerine) had telephone conversations and meetings with S. R. Lindstrom (Phillips) at the Petroleum Club in Los Angeles and elsewhere during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior to September 1970, and thereafter, the exact dates of which are unknown at the present time. Keane had similar conversations with Herbert Wetzler (Gulf), Horace McKay (Golden Eagle), Frank Randall (Golden Eagle), Walter Juergens (Fletcher), Edwin Anderson (Fletcher), George Martin (Douglas) and Richard Brehme (Signal). During these conversations the partici-

pants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior to September 1970, and thereafter, during which Stanko advised McDaniels that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area. Jim Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme (Signal). These conversations occurred throughout 1969, prior to September 1970, and thereafter, the exact dates and places being unknown to the Government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas) and Claude Hendrix (Phillips) regularly during 1969, prior to September 1970, and thereafter, for the purpose of increasing, fixing, stabilizing, and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) during 1969, prior to September 1970, and thereafter, at which future price increases, general market conditions,

and each corporate defendant and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area. These conversations occurred frequently, both over the telephone and during luncheon meetings, the exact times and places of which are not known to the Government except that many of these discussions took place at the Petroleum Club.

Ken Galligan of Powerine Oil Company had many luncheons and other meetings with representatives of various defendants and co-conspirators prior to September 1970, and thereafter, where the subject of increasing the price of rebrand gasoline in the Western area was discussed for the purpose of increasing, fixing, stabilizing, and maintaining such prices.

Jack Keane of Powerine also had many luncheons, telephone conversations and other meetings with defendants and co-conspirators prior to September 1970 and thereafter. It was a common practice for Keane and Wetzler to have lunch together where market conditions and the feasibility of increasing prices for rebrand gasoline to be sold in the Western area were discussed.

Additional communications in furtherance of the offense took place prior to September 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases on rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators conducted additional activity in furtherance of the conspiracy over the telephone. For example, John Guy (Phillips (Seaside)) called Jack Keane (Powerine) on occasion prior to Sep-

tember 1970, and thereafter, to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

Typically when a defendant or co-conspirator decided to increase its price, it would notify its customers of the impending price raise and at the same time notify its competitors. For example Jack Keane (Powerine) would call Wetzler (Gulf), Juergens or Anderson of Fletcher, McKay or Randall of Golden Eagle, Brehme of Signal, Martin of Douglas and Guy of Seaside (Phillips). Other telephone calls were exchanged among the defendants and co-conspirators prior to September 1970 and thereafter to ascertain that each would follow through in effectuating price increases and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane would call Wetzler and Wetzler would then call Martin. The dates, places and participants in some of these telephone calls are contained in the records of defendants and co-conspirators in the government's possession, which records the government will make available upon request.

A meeting was held in spring or summer of 1970, the exact date and place of which is unknown, at which representatives of at least Powerine, Phillips, Douglas and Gulf were present and discussed the generally depressed market conditions in the wholesale gasoline market and the desirability of increasing the wholesale price of rebrand gasoline sold in the Western area. The individuals who attended this meeting are not known except for Harry R. Rothschild (Powerine) and John J. Stanko (Douglas).

All the exchanges of information set forth above were either for the purpose of forming the conspiracy or were

in furtherance thereof, the exact purpose currently being unknown, and created an atmosphere of trust among the defendants and co-conspirators which facilitated formation and/or furtherance of the conspiracy.

C. Conspiratorial Conduct In September 1970

Peter Rothschild (Powerine) had telephone conversations and meetings with S. R. Lindstrom (Phillips) at Rothschild's office in Santa Fe Springs and elsewhere during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior and subsequent to August 1970, the exact dates of which are unknown at the present time. Keane (Powerine) had similar conversations with Herbert Wetzler (Gulf), Horace McKay (Golden Eagle), Frank Randall (Golden Eagle), Walter Juergens (Fletcher), Edwin Anderson (Fletcher), George Martin (Douglas) and Richard Brehme (Signal).

Keane (Powerine) confirmed the agreements between Rothschild and Lindstrom during telephone conversations and meetings with Lindstrom at the Petroleum Club in Los Angeles. During these conversations the participants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior and subsequent to August 1970 during which Stanko advised McDaniels

that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area. James Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson (Fletcher) during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme. These conversations occurred prior and subsequent to August 1970, the exact dates and places being unknown to the government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas), Claude Hendrix (Phillips) and Herbert Wetzler (Gulf) regularly prior and subsequent to August 1970 for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) prior and subsequent to August 1970 at which future price increases, general market conditions, and each corporate defendant's and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, stabilizing and maintaining rebrand gasoline prices in the Western area. These conversations occurred frequently, both over the telephone and during luncheon meetings, the exact times and places of which are not

known to the Government except that many of these discussions took place at the Petroleum Club.

Ken Galligan of Powerine Oil Company had many luncheons and other meetings with representatives of various defendants and co-conspirators prior and subsequent to August 1970, where the subject of increasing the price of rebrand gasoline in the Western area was discussed for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Jack Keane of Powerine also had many luncheons, telephone conversations and office meetings with defendants and co-conspirators prior and subsequent to August 1970. It was a common practice for Keane and Wetzler to have lunch together where market conditions were discussed, as was the feasibility of increasing prices for rebrand gasoline to be sold in the Western area.

Additional communications in furtherance of the offense also took place prior and subsequent to August 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases on rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators engaged in additional activity in furtherance of the conspiracy over the telephone. For example, John Guy (Phillips (Seaside)) called Jack Keane (Powerine) on occasion prior and subsequent to August 1970 to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. Other phone calls were exchanged among the defendants and co-conspirators prior and subsequent to August 1970 to ascertain that each would follow through in effectuating the increase

and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane called Wetzler and Wetzler would then call Martin. The dates, places, and participants in these phone calls are contained in records of defendants and co-conspirators in the government's possession, which records the government will make available upon request.

Other conversations occurred in September 1970 for the purpose either of forming or furthering the conspiracy to affect the price of rebrand gasoline in the Western area. The government is not aware of the exact time and place of each of these conversations, except as follows:

Peter Rothschild (Powerine) had a telephone conversation in his office with S. R. Lindstrom (Phillips) and received assurances that Phillips would increase its price.

Either Harry R. Rothschild or Edward Barnes of Powerine spoke with John J. Stanko (Douglas) who indicated that Douglas Oil Company would be increasing prices.

Kenneth Galligan or Jack Keane of Powerine telephoned Frank Randall or Horace McKay of Golden Eagle who stated in substance that Golden Eagle's prices would be increased if the others increased their respective prices.

Kenneth Galligan or Jack Keane had a telephone conversation with either Edwin Anderson or Walter Juergens of Fletcher who stated in substance that Fletcher would increase its prices if Douglas increased its prices.

Several meetings were held during the Pacific Oil Conference held at the Nugget Motor Lodge on September 23, 24, 25, 1970 at Sparks, Nevada, involving the defendants

and co-conspirators. Participants known to the government were Galligan (Powerine), Juergens (Golden Eagle), Anderson (Fletcher), Hopwood (Douglas), Guy (Seaside) and Randall (Golden Eagle). On this occasion, price increases to be effectuated by the defendants and co-conspirators in October 1970 for rebrand gasoline for the Western area were discussed and agreed upon. Galligan (Powerine) approached Hopwood (Douglas), on or about September 24, 1970 in a hospitality suite hosted by the Douglas Oil Company located in the Nugget Motor Lodge in Sparks, Nevada, during the Pacific Oil Conference, and asked Hopwood, in effect, if the Douglas Oil Company was intending to increase the price of gasoline. Hopwood placed a call to Douglas' offices in Los Angeles and subsequently replied that Douglas would be going along with the price increase. Galligan then confirmed the impending price increase with Juergens or Anderson of Fletcher, Guy of Seaside (Phillips) and Randall of Golden Eagle. He then called Powerine's offices to inform Peter and Harry R. Rothschild of the results of his activities.

Other meetings among the co-conspirators in September 1970 for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area include:

DATE	PARTICIPANTS	PLACE
9-04-70	Anderson (Fletcher) Enge (MacMillan)	Charlie Brown's
9-04-70	McDaniels (MacMillan) Clark (Douglas Stanko (Douglas)	Jonathan Club
9-07-70	McDaniels (MacMillan) Sturges (Signal)	Mediterrania

DATE	PARTICIPANTS	PLACE
9-09-70	Juergens (Fletcher) Anderson (Fletcher) Galligan (Powerine)	Saddleback Inn
9-11-70	Wetzler (Gulf) Keane (Powerine)	Saddleback Inn
9-15-70	Enge (MacMillan) Delpit (Fletcher) Clark (Douglas)	Marcus
9-15-70	McDaniels (MacMillan) Anderson (Fletcher)	Paul Young Washington
9-15-70	McDaniels (MacMillan) Barnes (Powerine)	Embers Washington
9-22-70	Barnes (Powerine) Stanko (Douglas) Clark (Douglas)	Jonathan Club
9-22-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
9-22-70	Wetzler (Gulf) Keane (Powerine)	Yamato's
9-23-70	Sinclair (Phillips) Ault (Golden Eagle)	Blarney Castle
9-23-70	McDaniels (MacMillan) Clark (Douglas)	L.A. Hilton
9-24-70	Barnes (Powerine) Stanko (Douglas) Clark (Douglas)	Jonathan Club
9-25-70	Barnes (Powerine) Sinclair (Phillips)	Jonathan Club
9-26-70	Sinclair (Phillips) Clark (Douglas)	USC-Oregon at Coliseum

DATE	PARTICIPANTS	PLACE
9-28-70	Delpit (Fletcher) Sturges (Signal)	Petroleum Club
9-30-70	Sinclair (Phillips) Delpit (Fletcher)	Blarney Castle
9-30-70	McDaniels (MacMillan) Galligan (Powerine)	Lunch

D. Conspiratorial Conduct Subsequent to September 1970

The government has agreed to provide general particulars only concerning conspiratorial conduct performed by the defendants and co-conspirators subsequent to the formation of their conspiracy. While the exact date of such formation is currently unknown, the conspiracy was in existence as of September 25, 1970. Consequently, the statements provided below are general particulars concerning what occurred subsequent to September 1970 and do not constitute the details of the government's evidence in response to the defendants' improper requests therefor.

PARTICULARS

Peter Rothschild of Powerine had telephone conversations and meetings with S. R. Lindstrom (Phillips) during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior and subsequent to September 1970, the exact dates of which are unknown at the present time. Keane (Powerine) confirmed the agreements between

Rothschild and Lindstrom during telephone conversations and meetings with Lindstrom at the Petroleum Club in Los Angeles.

Typically when a defendant or co-conspirator decided to increase its price prior and subsequent to September 1970, he or it would notify its customers of the impending price raise by telephone and at the same time call its competitors. For example Jack Keane (Powerine) would call Wetzler (Gulf), Juergens or Anderson of Fletcher, McKay or Randall of Golden Eagle, Brehme of Signal, Martin of Douglas and Guy of Seaside (Phillips). During these conversations the participants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior and subsequent to September 1970 during which Stanko advised McDaniels that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area but would not increase Douglas' price to MacMillan until MacMillan was able to increase its rebrand price. Jim Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson (Fletcher) during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme (Signal). These conversations occurred prior and subsequent to September 1970, the exact dates and place being unknown to the Government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline

in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas) and Claude Hendrix (Phillips) regularly prior and subsequent to September 1970 for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan and Powerine), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) prior and subsequent to September 1970 at which future price increases, general market conditions, and each corporate defendant's and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

These conversations occurred frequently, both over the telephone and during luncheon meetings, all of which the exact times and places are not known to the government. Typical examples of such meetings include the following:

DATE	PARTICIPANTS	PLACE
10-01-70	McDaniels (MacMillan) Stanko (Douglas) Clark (Douglas)	Jonathan Club
10-01-70	Delpit (Fletcher) Sinclair (Phillips) Lindstrom (Phillips)	Unknown
10-02-70	Stanko (Douglas) Barnes (Powerine)	Breakfast at Jonathan Club
10-03-70	Sinclair (Phillips) Clark (Douglas)	Dinner at Lafittes
10-05-70	Delpit (Fletcher) Lindstrom (Phillips)	Unknown

DATE	PARTICIPANTS	PLACE
10-06-70	McDaniels (MacMillan) Delpit (Fletcher)	Lunch
10-06-70	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club
10-06-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club
10-07-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
10-08-70	Delpit (Fletcher) Clark (Douglas)	Petroleum Club
10-08-70	Stanko (Douglas) Enge (MacMillan)	Jonathan Club
10-08-70	Lindstrom (Phillips) Harry R. Rothschild (Powerine)	Dinner at Rueben E. Lee
during week of 10-12-70 thru 10-16-70	Ault (Golden Eagle) Sinclair (Phillips)	Lunch
10-12-70	Enge (MacMillan) McDaniels (MacMillan) Clark (Douglas) Stanko (Douglas)	Jonathan Club
10-14-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Brown Derby
10-14-70	Anderson (Fletcher) Clark (Douglas) Stanko (Douglas)	Jonathan Club
10-16-70	Enge (MacMillan) Delpit (Fletcher)	Petroleum Club

DATE	PARTICIPANTS	PLACE
10-17-70	Anderson (Fletcher) Delpit (Fletcher) Sinclair (Phillips)	U.S.C. v. Washington at Coliseum
10-19-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
10-19-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club Breakfast
10-20-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
10-22-70	Wetzler (Gulf) Keane (Powerine)	Yamato
10-26-70	McDaniels (MacMillan) Barnes (Powerine)	Lunch
10-28-70	Wetzler (Gulf) Galligan (Powerine)	Century House
10-30-70	Anderson (Fletcher) Randall (Golden Eagle)	Jonathan Club
11-01-70	McDaniels (MacMillan) Keane (Powerine)	Jonathan Club
11-03-70	Lindstrom (Phillips) Clark (Douglas)	Petroleum Club
11-03-70	Anderson (Fletcher) Clark (Douglas) Barnes (Powerine)	Jonathan Club
11-03-70	Keane (Powerine) Wetzler (Gulf)	Luau
11-04-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-06-70	Barnes (Powerine) McDaniels (MacMillan)	The Cove

DATE	PARTICIPANTS	PLACE
11-10-70	McDaniels (MacMillan) Anderson (Fletcher)	Jonathan Club
11-11-70	Wetzler (Gulf) Keane (Powerine)	East Los Angeles
11-11-70	Stanko (Douglas) Barnes (Powerine) Clark (Douglas)	Jonathan Club Tap Room
11-11-70	Lindstrom (Phillips) Sturges (Signal)	Petroleum Club
11-12-70	Sinclair (Phillips) Barnes (Powerine)	Unknown
11-12-70	Enge (MacMillan) Barnes (Powerine)	Jonathan Club Breakfast
11-12-70	Sinclair (Phillips) Barnes (Powerine) Lindstrom (Phillips) Clark (Douglas)	Jonathan Club Grill Room
11-13-70	Enge (MacMillan) Galligan (Powerine) Keane (Powerine)	Petroleum Club
during week of		
11-15-70	Ault (Golden Eagle) Stanko (Douglas)	Americana Hotel New York
11-15-70	Delpit (Fletcher) Clark (Douglas)	New York
11-16-70	Anderson (Fletcher) Clark (Douglas)	Kismet Lounge New York
11-17-70	McDaniels (MacMillan) Anderson (Fletcher)	New York
11-17-70	McDaniels (MacMillan) Clark (Douglas)	New York

DATE	PARTICIPANTS	PLACE
11-18-70	McDaniels (MacMillan) Delpit (Fletcher)	Unknown
11-20-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-22-70	Delpit (Fletcher) Enge (MacMillan) Anderson (Fletcher)	Unknown
11-23-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-30-70	Enge (MacMillan) Sturges (Signal)	Petroleum Club
11-30-70	Anderson (Fletcher) Barnes (Powerine)	Lunch at Cook's Steak House, L.A.
12-01-70	Enge (MacMillan) Anderson (Fletcher)	Jonathan Club
12-07-70	Eisemann (Gulf) Ault (Golden Eagle)	Lunch
12-09-70	Wetzler (Gulf) Brehme (Signal)	Century House
12-09-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Brown Derby
12-15-70	Barnes (Powerine) Delpit (Fletcher)	Jonathan Club
12-17-70	Enge (MacMillan) Clark (Douglas)	Googie Breakfast
12-17-70	Wetzler (Gulf) Keane (Powerine)	Yamato
12-18-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club

DATE	PARTICIPANTS	PLACE
12-20-70	Enge (MacMillan) Delpit (Fletcher) Anderson (Fletcher)	Jonathan Club
12-28-70	Enge (MacMillan) Keane (Powerine)	Jonathan Club
12-29-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club
12-29-70	Delpit (Fletcher) Enge (MacMillan)	Jonathan Club
1-09-71	Anderson (Fletcher) Sinclair (Phillips) Stanko (Douglas)	Jonathan Club
1-13-71	Sinclair (Phillips) Stanko (Douglas)	Sheraton West
1-18-71	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
1-20-71	Anderson (Fletcher) Barnes (Powerine) McDaniels (MacMillan)	Statler Steak House Washington, D.C.
1-29-71	Wetzler (Gulf) Keane (Powerine)	Lunch at Century House
2-01-71	Anderson (Fletcher) Hopwood (Douglas)	Los Angeles
2-06-71	Anderson (Fletcher) Enge (MacMillan)	Anaheim
2-09-71	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club
2-17-71	Anderson (Fletcher) Barnes (Powerine)	Long Beach
2-22-71	Anderson (Fletcher) Clark (Douglas)	Jonathan Club

DATE	PARTICIPANTS	PLACE
2-22-71	Wetzler (Gulf) Brehme (Signal)	Yamato
3-08-71	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
3-11-71	Anderson (Fletcher) Enge (Powerine)	Unknown
3-28-71	Anderson (Fletcher) Barnes (Powerine)	Lunch
4-02-71	Wetzler (Gulf) Hendrix (Phillips)	Lunch at Senor Pico
4-15-71	Wetzler (Gulf) Keane (Powerine)	Lunch at Yamato
4-30-71	Anderson (Fletcher) Enge (Powerine)	Lumbardo's Long Beach
5-17-71	Anderson (Fletcher) Eisemann (Gulf)	Jonathan Club
5-18-71	Anderson (Fletcher) Delpit (Fletcher) Clark (Douglas) Barnes (Powerine)	Los Angeles
5-18-71	McKay (Golden Eagle) Sturges (Signal)	Lunch
6-02-71	Anderson (Fletcher) Stanko (Douglas)	Jonathan Club
6-03-71	Anderson (Fletcher) Enge (Powerine)	Saddleback Inn Norwalk
7-01-71	Wetzler (Gulf) Keane (Powerine)	Lunch
7-05-71	Anderson (Fletcher) Clark (Douglas)	Red Witch Inn Long Beach

DATE	PARTICIPANTS	PLACE
7-13-71	Anderson (Fletcher) Barnes (Powerine)	Saddleback Inn Norwalk
7-14-71	Anderson (Fletcher) McNutt (Douglas)	Jonathan Club
7-19-71	Barnes (Powerine) Clark (Douglas) McNutt (Douglas)	Unknown
7-30-71	Wetzler (Gulf) Keane (Powerine)	Yamato's

Additional communications in furtherance of the offense also took place prior and subsequent to September 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases of rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators engaged in additional activity in furtherance of the conspiracy over the telephone. For example, John Guy called Jack Keane on occasion prior and subsequent to September 1970 to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area. Other phone calls were exchanged among the defendants and co-conspirators prior and subsequent to September 1970 to ascertain that each would follow through in effectuating price increases and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane would call Wetzler and Wetzler would then call Martin.

On October 21, 1970, Ed Clark of Douglas had cocktails at the Petroleum Club with Larry Delpit of Fletcher. Clark indicated to Delpit that Douglas was going to increase the

spread between regular and premium gasoline from 2.0 to 2.2 cents and wanted Fletcher's reaction so as to aid Douglas and the other defendants and co-conspirators in increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area.

McKay of Golden Eagle and Anderson of Fletcher discussed the feasibility of instituting the 2.2 differential at a luncheon meeting at the end of October 1970. It was here that McKay stated that Anderson related to him that Douglas was also intending to institute the 2.2 spread in November.

On October 27 and 28, 1970, Hand of Douglas called Guy (Phillips (Seaside)) to give Seaside advance notice of Douglas' price increase to a 2.2 cent spread between regular and premium rebrand gasoline to be sold in the Western area so as to aid in increasing, fixing, stabilizing and maintaining such prices. On October 29, 1970, there were two telephone calls placed to Powerine by Douglas for similar objectives. Galligan received a telephone call from Hopwood about this time (the week of October 20, 1970) in which Hopwood indicated that Douglas was going to increase the differential between regular and premium rebrand gasoline in the Western area to 2.2 cents.

Discussions were also had in October 1970 between Clark and McNutt of Douglas and Delpit of Fletcher about increasing the spread between regular and premium rebrand gasoline to be sold in the Western area to 2.2 cents per gallon.

On November 3, 1970, Keane and Wetzler had lunch and discussed the proposed 2.2 cent spread between regular and premium rebrand gasoline sold in the Western area. After this lunch, at approximately 2:19 p.m., Keane placed a telephone call to Martin of Douglas to convey to Martin

information on the proposed price increase so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. On December 4, 1970, Keane and Wetzler had another lunch where the 2.2 cent spread was discussed.

On December 8, 1970, Clark (Douglas) had lunch with Sinclair of Phillips. This meeting was held to pass along information about the increase to the 2.2 cent spread between the price of regular and premium rebrand gasoline sold in the Western area so as to aid all the defendants and co-conspirators in increasing, fixing, stabilizing and maintaining prices for such gasoline in such area.

E. Price Movements Made Pursuant to the Conspiracy

In early October, 1970 each of the defendants increased the price of rebrand gasoline sold in the Western area pursuant to the conspiracy. Each of the defendants and co-conspirators did not necessarily increase its prices of rebrand gasoline to each and every one of its rebrand customers on the above dates—the dates indicated reflect a general implementation of the price increases. The date each defendant and co-conspirator increased its price and the amount of the increase is indicated below.

DATE	COMPANY	INCREASE (cents/gallon)
10-01-70	MacMillan	0.50
10-05-70	Douglas	0.30
10-05-70	Powerine	0.25
10-08-70	Fletcher	0.40
10-09-70	Gulf	0.30
10-09-70	Phillips (Seaside)	0.25
10-12-70	MacMillan	0.25
10-12-70	Phillips	0.25
10-16-70	Golden Eagle	0.30

The defendants and co-conspirators also increased the differential or "spread" between the price of premium and regular rebrand gasoline sold in the Western area from 2.0 cents per gallon to 2.2 cents per gallon, effective on the dates indicated below, pursuant to their conspiracy:

DATE	COMPANY
11-01-70	Douglas
11-09-70	Gulf
11-18-70	Fletcher
11-20-70	MacMillan
11-24-70	Phillips
11-25-70	Golden Eagle
12-02-70	Phillips (Seaside)
12-14-70	Powerine
1-05-71	Signal

Additional increases in the price of rebrand gasoline to be sold in the Western area pursuant to the conspiracy were effectuated in December, 1970 and early January, 1971 as follows (these dates reflect a general implementation of the increases):

DATE	COMPANY	INCREASE (cents/gallon)
12-05-70	Signal	0.70
12-14-70	Powerine	0.70
12-14-70	Gulf	0.25
12-21-70	Fletcher	0.60
12-22-70	Golden Eagle	0.90
12-23-70	Phillips (Seaside)	0.50
12-24-70	Douglas	0.50
12-26-70	MacMillan	0.60
12-26-70	Phillips	0.50
1-04-71	Gulf	0.25

+ + +

Kenneth Galligan withdrew from the conspiracy on April 6, 1973 by verbally disclosing its existence to the government. Documents referring to this withdrawal are the government's work product and are not subject to discovery at this time.

Defendants' Request C-1

1. Separately as to each defendant and each alleged co-conspirator, please identify each price referred to in such paragraph 12 of the indictment.

Response to Defendants' Request C-1

The government is not aware of all the prices increased, fixed, stabilized, and maintained throughout the duration of the crime by the defendants and co-conspirators. In general, however, the prices referred to are the amount of money charged per gallon of gasoline, exclusive of tax and transportation charges, by the defendants and co-conspirators for unbranded or rebrand gasoline sold in the Western area throughout the period covered by the indictment. Rebrand gasoline is gasoline which is ultimately sold under retail brand names not owned or controlled by an oil refiner. Each of the various gasoline wholesalers, including the defendants, has its own terminology for its price for rebrand gasoline such as "rack price," "spot price," "contract price," or "unbranded jobber price."

Gasoline is sold in various grades. The grades are often differentiated by research octane ratings. The two most commonly sold grades of rebrand gasoline in the Western area in 1970 and 1971 were regular, with a research octane rating of approximately 91, and premium with a research octane rating of approximately 100.

Premium gasoline normally sells at a higher price than regular gasoline. The differential between the price of a gallon of premium gasoline and a gallon of regular gasoline is sometimes known as the "spread."

"Price" as used in paragraph 12 of the indictment includes the price of regular rebrand gasoline and the price of premium rebrand gasoline.

+ + +

Defendants' Request E-1

1. Separately as to each defendant and each alleged co-conspirator, please (a) state each date upon which such person is claimed to have increased its price for rebrand gasoline pursuant to the alleged combination and conspiracy, (b) identify each product upon which the price was allegedly raised, (c) identify the price such person had charged for rebrand gasoline immediately previous to such date (hereafter "the original price"), (d) identify the new, increased price such person is alleged to have put into effect on such date (hereafter "the increased price"), (e) identify each customer to whom such person is alleged to have extended or attempted to extend the increased price on or subsequent to such date, (f) identify each writing which is alleged to indicate, imply, evidence, demonstrate or refer to either the original price or the increased price, including but not limited to each price sheet in which either the original or the increased price is indicated, implied, evidenced, demonstrated or referred to and (g) state each fact, and identify each writing, act or other conduct which is alleged to indicate, imply, evidence or demonstrate that such price was at an "artificial" or "non-competitive" level.

Response to Defendants' Request E-1

To the extent that the government currently has knowledge of the dates upon which each defendant and co-conspirator began charging the higher prices and the amounts the prices were increased pursuant to the crime charged in the indictment, such knowledge is set forth in Response A-2, Section E. The price for each grade of rebrand motor gasoline sold by each defendant and co-conspirator was increased pursuant to the crime charged in the indictment on or about the dates indicated in the response. In addition, the defendants and co-conspirators increased the price of premium rebrand gasoline by an additional 0.2 cents per gallon over that of regular rebrand gasoline on the dates indicated in Response A-2, Section E that the defendants went to a 2.2 cent "spread." Intermediate grades, those with research octane ratings between regular and premium, were increased proportionately on those dates. These prices, as well as all other prices charged by the defendants and co-conspirators for rebrand gasoline sold in the Western area during the period covered by the indictment, were at artificial and non-competitive levels because they were increased by agreement among the conspirators instead of being determined by the independent business judgment of each based upon free and unfettered competition in the marketplace.

Facts which show the conspiracy and agreement among the defendants and co-conspirators to increase prices for rebrand gasoline sold in the Western area to artificial and non-competitive levels, to the extent such facts are currently known to the government, are set forth in Response A-2 in its entirety. More particularly, facts concerning the specific price increases appearing in Section E are detailed in Sections C and D.

The specific prices charged by each defendant and co-conspirator to each of its rebrand customers, to the extent of the government's knowledge, are contained in documents of the defendants and co-conspirators which are in the government's possession and have been or will be made available for inspection and copying by the defendants subject to the restrictions ordered by the Court. Respecting the request for document identification, the Court has provided a method by which documents in the government's possession may be inspected. Therefore, the request for further specification improperly calls for the details of the government's evidence.

Defendants' Request E-2

2. Separately as to each defendant and each alleged co-conspirator, please (a) state each date upon which, or period of time during which, such person is claimed to have (i) "fixed", (ii) "stabilized" or (iii) "maintained" any price of rebrand gasoline at an "artificial" or "non-competitive" level pursuant to the alleged combination or conspiracy, (b) identify each product which such person is alleged to have (i) "fixed", (ii) "stabilized" or (iii) "maintained", (c) identify each price which such person is alleged to have (i) "fixed", (ii) "stabilized" or (iii) "maintained" upon each such date or during each such period of time for each such product, (d) separately as to each such price, identify each customer to whom such person is alleged to have extended or to have attempted to extend such price, (e) separately as to each such price, identify each writing which is alleged to indicate, imply, evidence, refer to, or demonstrate such price, including but not limited to each price-sheet in which it is alleged that such price is indicated, implied, evidenced, demonstrated or referred to, and (f) separately as to each such price,

state each fact, identify each writing, act or other conduct which is alleged to indicate, imply, evidence, or demonstrate that such price was at an "artificial" or "non-competitive" level.

Response to Defendants' Request E-2

To the extent that the government currently has knowledge of the specific dates upon which the conspirators began charging increased prices for rebrand gasoline and the amounts the prices were increased pursuant to the crime charged in the indictment, such knowledge is set forth in Response A-2, Section E. These prices, as well as all other prices charged by the defendants and co-conspirators for rebrand gasoline sold in the Western area during the period covered by the indictment, were fixed, stabilized, and maintained at artificial and non-competitive levels because they were set by agreement among the conspirators instead of being determined by the independent business judgment of each based upon free and unfettered competition in the marketplace.

Facts which show the conspiracy and agreement among the defendants and co-conspirators to fix, stabilize, and maintain prices for rebrand gasoline sold in the Western area at artificial and non-competitive levels, to the extent such facts are currently known to the government, are set forth in Response A-2 in its entirety. More particularly, facts concerning the specific price increase appearing in Section E are detailed in Sections C and D.

The non-competitive prices continue to be fixed, stabilized and maintained by the defendants and co-conspirators. On or about August 15, 1971, all prices, including the prices of rebrand gasoline, were frozen by action of the President of the United States. In November, 1971

price controls were implemented. The maximum prices of rebrand gasoline have been regulated by various agencies of the federal government continuously from then until the present day. The base prices covered by the indictment in this case upon which controls are implemented are those artificial and non-competitive prices achieved by combination and conspiracy of the defendants and co-conspirators. Consequently, the price of rebrand gasoline sold by the defendants and co-conspirators in the Western area has been at a non-competitive level pursuant to the conspiracy until the present day.

Respecting the request for document identification, the Court has provided a method by which documents in the government's possession may be inspected. Therefore, the request for further specification improperly calls for the details of the government's evidence.

Defendants' Request E-4

4. (a) Please state each means by which price competition in the sale of rebrand gasoline is claimed to have been suppressed by the alleged combination or conspiracy, and (b) separately as to each defendant and each alleged co-conspirator, state each means by which price competition in the sale of rebrand gasoline is claimed to have been suppressed by the statements, communications, acts or other conduct of such defendant or such alleged co-conspirator.

Response to Defendants' Request E-4

The government is uncertain as to the intended meaning of the word "means" in this request for particulars. However, price competition in the sale of rebrand gasoline in the Western area was suppressed by the agreement of

each of the defendants to increase the price at which it sold such gasoline and the subsequent increase in price pursuant to the agreement. In addition, price competition in the sale of rebrand gasoline in the Western area was suppressed by the agreement of the defendants to increase the spread between the prices at which they sold such regular and premium gasoline and the subsequent increase in the spread pursuant to the agreement. As a part of the agreement to increase the price of such gasoline, each of the defendants and co-conspirators agreed not to solicit the business of a customer of another defendant or co-conspirator while the price increase was being effectuated, thereby further suppressing price competition.

The details of the "means" used to accomplish these unlawful results, to the extent currently known to the government, are set forth in Response A-2 in its entirety. When an individual co-conspirator is described in the Response as having participated, his participation was also the participation of his company employer and of all the other defendants and co-conspirators.

Dated: August 29, 1975

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No. 77-1547

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, PETITIONERS

v.

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, COINOCO AND UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 1-8) is reported at 571 F.2d 1127. The order of the district court (A. 48-49) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978. The petition for a writ of cer-

tiorari was filed on April 28, 1978, and granted on June 19, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion or applied an incorrect legal standard when, after the conclusion of all criminal proceedings, it authorized release to private plaintiffs in an antitrust action of grand jury materials already disclosed to the defendants, for the limited purposes of impeachment or refreshing recollection of witnesses.

2. Whether the district court in which a grand jury was impaneled was authorized to make a limited disclosure of grand jury materials for use in a private antitrust case pending in another district.

STATEMENT

In November and December 1973, Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco (collectively "Petrol Stops") began two antitrust actions in the United States District Court for the District of Arizona. Petrol Stops claimed that Douglas Oil Company of California ("Douglas"), Phillips Petroleum Company ("Phillips"), and other gasoline refiners and distributors had conspired to fix prices and restrict access to gasoline in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. *Petrol Stops Northwest* v. *Continental Oil Co.*, Civ. No. 73-212 Tuc-JAW (D. Ariz., filed Dec. 13, 1973); *Gas-A-Tron of Arizona* v. *Union Oil Co.*, Civ. No. 73-191 Tuc-WCF (D. Ariz., filed Nov. 2, 1973) (A. 129-167).

In the meantime, a grand jury in the Central District of California was investigating possible gasoline price fixing by Douglas, Phillips and others. In the course of its investigation, it called certain employees of Douglas and Phillips as witnesses. It also subpoenaed documents from the corporations.

The grand jury in March 1975 indicted Douglas, Phillips and four other corporations for fixing the price of rebrand gasoline.[1] *United States* v. *Phillips Petroleum Co.*, No. 75-377-MML (C.D. Cal., filed Mar. 19, 1975) (A. 118-123). The defendants initially pleaded not guilty. In the course of preparation for trial, Phillips and Douglas demanded and obtained from the prosecutors copies of the grand jury testimony of their employees. See Fed. R. Crim. P. 16(a)(1)(A). In December 1975, however, these defendants changed their pleas from not guilty to nolo contendere.[2] The court accepted the nolo pleas, fined each defendant the maximum $50,000, and the criminal action ended (A. 1).

In December 1976 Petrol Stops applied to the United States District Court for the Central District of California to obtain, for use in its Arizona anti-

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[1] "Rebrand gasoline" was defined in the indictment as gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner (A. 118).

[2] All the defendants except Douglas and Phillips had changed their please to nolo contendere on June 5, 1975, and were sentenced to fines of $50,000 each.

trust action, the portions of the grand jury transcript that had been made available to Phillips and Douglas during the criminal proceedings (A. 114-117). Also requested were all documents that Phillips and Douglas had produced in response to grand jury subpoenas (A. 115). The government, custodian of the material, did not object to the disclosure sought by Petrol Stops (A. 99-100).

After holding a hearing (A. 50-64), the district court authorized Petrol Stops to inspect and copy the requested grand jury testimony and the documents produced by Phillips and Douglas (A. 48-49). It limited disclosure to counsel for Petrol Stops in the pending Arizona antitrust cases (A. 49) and further limited the use of the grand jury material "solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial" (A. 49).

The court of appeals unanimously affirmed (A. 1-8). It found that the indictment charged antitrust violations similar to those alleged in the private actions (A. 1-2), and it held that the district court's "carefully limited disclosure" comported with prevailing case law and was not an abuse of discretion (A. 8).[3]

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[3] A question arises whether the case was properly before the court of appeals since the appellants (the present petitioners) were neither formal parties in the district court nor the addressees of the order issued by that court. See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911). The court of appeals resolved the question in favor of jurisdiction (A. 2-4). In our view, that conclusion was justified on either of two grounds. First, it may be that the disclosure hearing, notwithstanding the new caption (see A. 48, 52, 114), should be deemed an ancillary proceeding in the criminal case, in which petitioners were of course full parties. Alternatively, if the petition for production initiated a wholly separate case, it would seem that the present petitioners effectively intervened in the district court and were treated as parties in that court. See A. 90-98; 52-64; 48.

SUMMARY OF ARGUMENT

I

The lower courts correctly applied established standards in ordering disclosure of grand jury testimony. The applicants, plaintiffs in private antitrust litigation, described the requested grand jury materials with specificity. They did not seek wholesale disclosure of the transcript, but, rather, sought only the testimony of the defendants' employees before the grand jury. And they showed a particularized need for disclosure to impeach or refresh recollection by pointing to possible conflicts between the petitioners' answers to interrogatories in the civil suit and their plea of nolo contendere to the indictment, and also between statements of the defendants' employees in depositions and statements in the government's bill of particulars.

On the other hand, the need for continued grand jury secrecy was severely attenuated. When, as here, the criminal proceedings have terminated, the primary concern is to protect witnesses from retaliation. But that consideration is diminished when the portions of the grand jury transcript sought have already been

disclosed to the witnesses' employers. Because the employer has the greatest incentive to retaliate and it is common practice in criminal actions for multiple defendants to exchange the testimony of their employees, the release of portions of the grand jury transcript does not seriously implicate any of the reasons for grand jury secrecy.

II

Contrary to petitioners' argument, there is no rule that the disclosure decision must always be made by the civil action court. On the contrary, ultimate authority to disclose grand jury material rests in the district in which the grand jury was convened. That court makes the disclosure decision or authorizes another court to make it. Whether referral to the civil court is appropriate will depend upon the particular circumstances: it is not required in every case.

Here the district court did not abuse its discretion in making the disclosure decision alone. The need for the materials was clear, the interest in maintaining secrecy was minimal, and the balance was easily struck. In this situation, it was entirely proper for the grand jury court to order disclosure without a wasteful reference to a second court.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION AND CORRECTLY APPLIED THE APPLICABLE LEGAL STANDARD WHEN IT AUTHORIZED LIMITED DISCLOSURE OF GRAND JURY TRANSCRIPTS.

At the outset, we stress the narrow context of the present case. First, the procedural setting of the request for production of grand jury material is atypical. The disclosure sought did not implicate on-going grand jury or criminal proceedings. They had ended a year before the filing of the request. Here the applicants are private antitrust plaintiffs, not defendants in a criminal case. Compare *Dennis* v. *United States*, 384 U.S. 855 (1966). Moreover, the material asked for—the testimony of the defendants' employees—had already been disclosed to the defendants. That disclosure was authorized by Fed. R. Crim. P. 16(a)(1)(A). Thus, the question is not whether grand jury secrecy should be breached, but, rather, whether materials already divulged outside the government should be made available to both sides in private litigation. Finally, there is at least a potential contradiction between the plea of nolo contendere entered by the defendants in the criminal proceedings and their denial of actionable antitrust violations in defending the civil action.

Such is the setting in which the issue arises. But it is also relevant to note the limited character of the order actually entered. It did not condone a

"wholesale" turn-over of the grand jury transcript: less than one-fifth of the material was ordered produced. Compare *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). What is more, disclosure was restricted to plaintiffs' counsel, and use of the materials was expressly limited to impeaching witnesses or refreshing their recollection (A. 49).

In these special circumstances, we believe the district court was fully authorized to enter the challenged order.

1. It is of course well settled that the secrecy of grand jury proceedings must give way when justice requires it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940). Rule 6(e) of the Federal Rules of Criminal Procedure recognizes this principle by providing that disclosure of grand jury materials may be made "when so directed by the court preliminary to or in connection with a judicial proceeding." Rule 6(e)(2)(C)(i).[4] See *Pittsburgh Plate Glass Co.*

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[4] Although nothing turns on it, petitioners assert (Pet. Br. 3 & n.1) that we should look only to Rule 6(e) as it read when the district court made its decision, disregarding the 1977 formulation that did not become effective until the case was pending before the court of appeals. We submit that the 1977 amended rule is applicable to this case on appeal. Courts ordinarily apply the law in effect at the time of decision, even if the law changes during appellate proceedings. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The Federal Rules of Criminal Procedure apply to criminal proceedings in the appellate courts, *Harrison* v. *United States*, 191 F.2d 874, 875 (5th Cir. 1951), and it has usually been found "just and practicable" to apply the rules and amended rules to pending cases when they became effective. Fed. R. Crim. P. 59; *United States* v. *Sheridan*, 329 U.S. 379, 393 (1946) (newly enacted rules applied to case on remand). Application of the newly amended rule would create no injustice for, as petitioners agree (Pet. Br. 3 n.1), the meaning of the relevant part of the rule was not changed. 123 Cong. Rec. H7865 (daily ed. July 27, 1977) (remarks of Rep. Mann); S. Rep. No. 95-354, 95th Cong., 2d Sess. 6-8 (1977).

v. *United States*, 360 U.S. 395, 398-399 (1959). But the Rule does not tell us when such an order should be entered. To find the governing standard, we must turn to judicial precedent.

The landmark decision is the *Procter & Gamble* case in this Court, *supra*. There a grand jury investigation of possible antitrust violations did not lead to an indictment. After the grand jury was discharged, the United States filed a civil antitrust suit against the targets of the investigation and used the grand jury materials in preparing its civil case. Invoking Fed. R. Civ. P. 34, the defendants sought the entire grand jury transcript, which the district court ordered produced. This Court reversed. Stressing the policy of grand jury secrecy, the Court ruled that the need for disclosure must be shown with "particularity." 356 U.S. at 681-682. Also acknowledged, however, was the countervailing policy in favor of disclosure based on the fundamental concept that litigation should be "a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.* at 682. The Court explained that resolution of these opposing interests required a case by case balancing of the need for disclosure against the need for continued grand jury secrecy.

In *Procter & Gamble* the proponents of disclosure failed to make the requisite showing because they sought "wholesale" disclosure of the entire jury proceedings. *Id.* at 683. But the Court indicated that a different situation would be presented where the grand jury transcript was used "to impeach a witness, to refresh his recollection, to test his credibility and the like * * * [for] those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly." *Ibid.*

Later cases have employed this analysis, first requiring a particularized demonstration of need, and then balancing that showing against the interest in continued grand jury secrecy. *Dennis* v. *United States*, *supra*, 384 U.S. at 872 & n.18; *Illinois* v. *Sarbaugh*, 552 F.2d 768, 774 (7th Cir.), cert. denied, 434 U.S. 889 (1977); *U.S. Industries, Inc.* v. *United States District Court*, 345 F.2d 18, 21 (9th Cir.), cert. denied, 382 U.S. 814 (1965); *Allis-Chalmers Manufacturing Co.* v. *City of Fort Pierce*, 323 F.2d 233, 238 (5th Cir. 1963); see also *Pittsburgh Plate Glass Co.* v. *United States*, *supra*, 360 U.S. at 403 (Brennan, J., dissenting).[8]

2. The courts below, we submit, correctly applied these principles. The material requested was required to be described with particularity (A. 4, 53). The plaintiffs—instead of asking for a wholesale turnover

[8] Although the particularized need standard of *Procter & Gamble* concerned a motion for disclosure under Fed. R. Civ. P. 34, that standard has been applied in Fed. R. Crim. P. 6(e) cases. See, *e.g.*, *Illinois* v. *Sarbaugh*, *supra*.

of the entire grand jury transcript—specified only the testimony of the defendants' employees (A. 115-116). Next, the plaintiffs had to show a particularized need for this material, and this they did. They explained that they intended to use the material for the accepted and traditional purposes of impeachment and testing credibility, and, in the words of the court of appeals, plaintiffs showed "a particularized need beyond the mere relevance of the materials," pointing to apparent conflicts between the defendants' answers to interrogatories in the civil suit and their plea of nolo contendere to the indictment, and also between statements of the defendants' employees in depositions and statements in the bill of particulars (A. 7). Finally, the courts below undertook the traditional balancing task. Taking into account the fact that the material sought had long since been released to the defendants, the courts concluded that the plaintiffs' need outweighed any remaining interest in nondisclosure (A. 5-6, 7-8, 54).

Petitioners invite this Court to reweigh the evidence twice considered by the lower courts to reach the opposite result (Pet. Br. 22-25). That is a task the Court generally declines. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *FTC* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958); *Lawson* v. *United States Mining Co.*, 207 U.S. 1, 12 (1907). But, even if undertaken, it would not avail petitioners.

3. In effect, petitioners complain that the district court was over-generous in releasing too much material, too soon, and on an insufficient showing of need,

or indeed relevancy. Much is made of the district judge's remarks at the hearing, which can be read to place the burden on those resisting disclosure (A. 55, 57; Pet. Br. 22). But, we suggest, the correctness of the ultimate ruling must be determined by taking into account all the circumstances actually before the district court, including the written submissions (see A. 67-117), and not only the somewhat unguarded verbal exchange invoked by petitioners. That was the approach followed by the court of appeals and is, we believe, the only fair way of testing the order. The judgment of the court of appeals—not the oral remarks of a district judge—is the subject of review here.

a. The question of relevance is hardly debatable. As the court of appeals wrote (A. 2), "[t]he indictment charged antitrust conduct similar to that alleged in the damage action." Specifically, the indictment accused the two petitioners, among others, of conspiring to fix artificially high the price of "rebrand" gasoline in several Western states, including California, Oregon, Washington and Arizona (A. 118, 119, 121). One of the civil complaints alleges the identical conspiracy against petitioners in the first three of those states (A. 130, 138), and the other complaint charges Phillips with like conduct in Arizona (A. 149, 158).[6] To be sure, different co-

[6] The suggestion that the civil complaints refer to different conduct because they do not use the expression "rebrand gasoline" is frivolous. That term is defined in the indictment as gasoline sold by refiners for resale under a trademark other than their own (A. 118). Typically, of course, such transactions are with independent marketers (see A. 120) and it is in that way that the gasoline involved is described in the complaints (A. 141, 160).

conspirators are named, and the civil complaints include a number of other allegations not made in the indictment. But there is a sufficient overlap to make highly relevant in the civil proceedings any admission of price-fixing which petitioners' employees may have made to the grand jury.

b. Nor does the matter rest there. Petitioners had entered pleas of nolo contendere to the indictment, which only charged the conspiracy to fix at artificially high levels the price of "rebrand" gasoline. This was in effect an admission of the charge. *Lott* v. *United States*, 367 U.S. 421, 426 (1961). And yet, in answers to interrogatories filed in the civil cases, petitioners appeared to be denying such conduct (see A. 83-86, 103-104). There was thus at least a potential inconsistency that justified comparing what petitioners' employees had told the grand jury.[7]

[7] This showing may be contrasted with that made in *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir.), cert. denied, 434 U.S. 889 (1977). The court of appeals there rejected the argument that disclosure during the criminal proceedings to a corporate defendant of its employee's testimony was itself sufficient to show particularized need warranting further disclosure in a civil suit. That argument, and the propriety of the holding in *Texas*, are not presented here.

In addition, Petrol Stops submitted deposition testimony by petitioners' employees which demonstrated inconsistencies with the government's bill of particulars in the criminal action (A. 22-47). The court of appeals found this to constitute a "stronger showing" of particularized need (A. 7).

c. The circumstances just recited, we believe, justify both the extent and the timing of the release of the relevant material. Because of the restricted allegations of the indictment, it must be supposed that all the testimony of petitioners' employees before the grand jury was relevant to the issue now before the civil court. This is not, of course, the "wholesale" turnover of the transcript condemned in *Procter & Gamble, supra;* as we have said, less than one-fifth of the total was released. And there is no inflexible rule against releasing all of a particular witness' testimony. *E.g., Dennis* v. *United States, supra.*

Nor does the decision in *Procter & Gamble,* or any other case, suggest that disclosure must always await the trial testimony of the witness whose grand jury statements are sought. Here petitioners' answers to interrogatories created an appearance of conflict that was ripe for testing before trial. In this situation, we believe present release of the potentially conflicting evidence was wholly appropriate.

d. Finally, petitioners complain that the district court "erroneously held that no need for grand jury secrecy existed in this case" (Pet. Br. 26). Although this somewhat overstates the matter, the district court did follow Ninth Circuit precedent, which holds that once criminal proceedings are over, the release of part of a grand jury transcript which has already been released to the witness' employer does not seriously implicate any of the reasons for grand jury secrecy (A. 54-55; 5). At least as applied here, we submit that approach is correct.

This Court has approved a formulation that articulates five reasons for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble, supra, 356 U.S. at 681 n.6, quoting from *United States* v. *Rose,* 215 F.2d 617, 628-629 (3d Cir. 1954). Three of these reasons (1, 2, and 3) are not applicable after the criminal proceeding has terminated with a nolo plea. The primary consideration that remains after discharge of the grand jury is to protect witnesses from retaliation so that witnesses before future grand juries will testify freely. *Illinois* v. *Sarbaugh, supra;* see also *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 405-407 (Brennan, J., dissenting). There is a secondary interest in protecting innocent persons who may have been under investigation. The former interest is at stake in every case; the latter only when the grand jury materials would implicate such persons.

In light of Fed. R. Crim. P. 16(a)(1)(A),[8] an employee who testifies before a grand jury should assume that his employer may well, if indicted, obtain a transcript of his testimony. Moreover, in cases with multiple defendants, it is common for defendants to exchange transcripts among each other. See *Illinois* v. *Sarbaugh*, *supra*, 552 F.2d at 775. In these situations, since the parties with the greatest incentive and power to retaliate against the witness are likely to have access to his testimony, any additional disclosure is not likely to increase the risk a prospective witness would face in testifying. In the present case, where Douglas and Phillips obtained copies of all of their employees' grand jury testimony,[9] there is no appreciable chance that future testimony in other cases would be discouraged by disclosure to Petrol Stops' counsel under a protective order.

Petitioners nonetheless argue that the danger of retaliation by others in the industry is so great that

[8] Rule 16(a)(1)(A) provides in part:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

[9] They also obtained some of the testimony of the employees of their co-defendants.

disclosure to plaintiffs was erroneous (Pet. Br. 27). The assumption which underlies this argument is that a witness who will testify fully, knowing that his testimony will be made available to his employer, and most likely to his employer's co-defendants, will abandon his candor out of fear that the testimony might also be made available to others in the industry (Pet. Br. 12). Petitioners provide neither precedent nor empirical support for their assertion. Nor is it a proposition which is intuitively obvious. Quite to the contrary, common sense supports the position taken by all the courts which have considered the matter: that the additional putative harm which others in the industry might do is not of such significance as to weigh heavily against disclosure.

Moreover, any existing concern can be alleviated by the use of a protective order, as was done here. See *Illinois* v. *Sarbaugh*, *supra*. The district court did not unconditionally release the testimony. Rather, it imposed stringent protective conditions: only counsel for plaintiff may use the material, and "solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial" (A. 49). It is thus entirely possible that the grand jury testimony will never be made public at all.[10]

The suggestion that the district court neglected the grand jury's role in protecting the "innocent accused"

[10] Provided that the witnesses tell the same story now which they told the grand jury, plaintiffs will have no occasion to use the material.

(Pet. Br. 27, 14) is unpersuasive in the present context. The true innocent accused are a legitimate object of concern, but there is no reason to fear for them here. First, to the extent that any innocent accused may be mentioned in the transcript,[11] their identity has already been disclosed to the defendants. Second, the risk of more general disclosure is minimal. The requirement of relevance means that those who had nothing to do with the defendants' conspiracy are irrelevant to this case. Moreover, the material is subject to a protective order which prohibits its use except for impeachment and refreshing of recollection.[12]

The district court and court of appeals both concluded that the need for disclosure outweighed the remaining need for grand jury secrecy (A. 53-55; 7-8). In our submission, petitioners have failed to demonstrate that this conclusion was erroneous.[13]

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[11] Although petitioners have had access to the material, they do not argue that the names of previously-unrevealed subjects of investigation are in fact contained in the materials. They raise this point entirely as a hypothetical objection to releases of grand jury materials in general.

[12] The additional claim that disclosure would restrict the activities of future grand jurors by identifying them (Pet. Br. 14) is frivolous. Grand jury transcripts generally do not indicate the name of the grand juror making a statement or asking a question. Moreover, even if they did, petitioners would hardly have standing to complain, since they were the first to obtain copies of the testimony and obviously, as convicted criminals, have the greatest incentive to retaliate against the grand jurors who indicted them.

[13] The district court order also authorized disclosure of documents produced by Douglas and Phillips in response to grand jury subpoenas (A. 48). Although petitioners suggested in their petition that they challenged this ruling, they have apparently abandoned the claim, for their merits brief refers solely to the disclosure of transcripts of grand jury testimony.

We agree with the court of appeals that there was no error here. Documents subpoenaed by a grand jury, unlike the testimony, antedate the grand jury and are not its product. Because of this difference, it has been held that if documents are sought for their own intrinsic value, and not for the purpose of determining what transpired before the grand jury, the documents should be disclosed. *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960); *United States* v. *Cianfrani*, 448 F. Supp. 1102, 1105 (E.D. Pa. 1978). Here plaintiffs seek the documents not to discover the course of grand jury proceedings, but to use the documents independently to test the veracity and credibility of answers to interrogatories and depositions by Douglas and Phillips. Since petitioners do not contest the disclosure of the documents, the Court need not reach the question whether Rule 6(e) applies to documents subpoenaed for use by a grand jury. See *United States* v. *Weinstein*, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); *United States* v. *Interstate Dress Carriers, Inc., supra*; 1 Wright, *Federal Practice and Procedure* § 106 at 172 n.97 (1969).

II

THE DISTRICT COURT IN WHICH THE GRAND JURY WAS CONVENED PROPERLY EXERCISED ITS JURISDICTION TO DISCLOSE GRAND JURY TRANSCRIPTS.

Petitioners argue (Pet. Br. 28-44) that where the grand jury and civil actions proceed in different districts, the disclosure decision must always be made by the civil action court, and that in any event the grand jury court in this case abused its discretion by refusing to transfer the Rule 6(e) proceedings to

the civil action court. We submit that both contentions are erroneous.

1. Although Fed. R. Crim. P. 6(e)(2)(C)(i) provides for disclosure of grand jury materials "when so directed by a court * * *," it does not specify the relevant court. All precedent, however, indicates that ultimate authority to disclose grand jury materials rests in the district in which the grand jury was convened. *Illinois* v. *Sarbaugh*, *supra*, 552 F.2d at 772-773; *Gibson* v. *United States*, 403 F.2d 166, 167 (D.C. Cir. 1968); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1957).

The grand jury court is normally the starting point for such proceedings. It makes the disclosure decision or authorizes another court to make it. *In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc.*, 566 F.2d 1293 (5th Cir.), cert. denied, No. 77-1531 (June 19, 1978); *Illinois* v. *Sarbaugh*, *supra*; *Baker* v. *United States Steel Corp.*, *supra*, 492 F.2d 1074, 1075-1076 (2d Cir. 1974); *Gibson* v. *United States*, *supra*; *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431, 433 (2d Cir. 1963); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 491 (E.D. Pa. 1962). Disclosure can be sought directly from the court in which the grand jury was convened (see, *e.g.*, *Illinois* v. *Sarbaugh*, *supra*; *City of Philadelphia* v. *Westinghouse Electric Corp.*, *supra*), or the initial application to the grand jury court may seek only to have that court transfer the materials and vest the civil action court with authority to order disclosure. See, *e.g.*,

In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., *supra*. Alternatively, the civil action court may be asked to certify to the grand jury court that disclosure is warranted. *Gibson* v. *United States*, *supra*; *Baker* v. *United States Steel Corp.*, *supra*, 492 F.2d at 1076. But, in that event, the final decision rests with the grand jury court.

The upshot is that the approval of the court in whose district the grand jury sits is always necessary before its proceedings are disclosed. This is more than a technical jurisdictional requirement. It reflects the reality that the grand jury court is uniquely aware of the considerations, sometimes peculiar to the case or to the locality, that may weigh in favor of continued secrecy. No doubt, it will often also be useful to have the civil action court appraise the need for the materials in the proceedings pending there. But, in many cases, that need can easily be assessed by the grand jury court and it is unnecessary to consult formally the court of trial. In our submission, it can never be wrong to apply first to the grand jury court for disclosure of grand jury proceedings, and only in egregious instances should that court's decision be upset for failure to defer to the court of trial.

2. In the context of this case, petitioners' claim that the district court abused its discretion by deciding the issue of disclosure is unpersuasive. Given that the grand jury court had ultimate jurisdiction over the materials, the only question is whether it was required to defer to the civil trial court for a determination of need. No doubt, it could have done

so. But, it need hardly be said, choosing an alternative course is not automatically an abuse of discretion.

As we have stated, there is no general rule that the civil court must participate in every disclosure decision. Judicial time is too precious to require two hearings in every such case. Here, the basis of the plaintiffs' claim for the materials was clear enough. And, on the other hand, the considerations normally arguing against disclosure were attenuated. In these circumstances, the balance was not difficult to strike and the grand jury court could properly make the decision alone. There was no abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

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Introductory Statement

Both Congress and this Court have addressed the question of grand jury secrecy. Rule 6(e) of the Federal Rules of Criminal Procedure ("FRCrP") and the rigid requirements of "particularized need" articulated in *Procter & Gamble* demonstrate this Court's conclusion as to the importance of grand jury secrecy. Congress, likewise, has shown the same concern. *See e.g.,* the *Jencks Act,* 18 U.S.C. § 3500, passed in 1957 and amended as late as 1970, which rigidly controls the very limited use which a defendant charged with a crime may make of the grand jury transcript of an accusatory witness.

The policy underlying grand jury secrecy is prospective in operation: it assures all future grand jury witnesses that they may testify freely without fear that their testimony will be unnecessarily disclosed. That policy has been materially eroded by some lower federal courts in their willingness to subordinate the need for secrecy to liberal civil discovery. Those courts seem to be unaware that unnecessary broad disclosure of grand jury testimony invites harm to grand jury witnesses, innocent persons and the grand jury system. The fear of harm will impede free and willing disclosure of information by grand jury witnesses. Without free disclosure of any and all information that may be pertinent to antitrust violations, antitrust grand juries cannot successfully do their job.

This Court's opinion will have a significance beyond the understanding of most. It will determine the approach of every lawyer representing a client in a "business crime" grand jury investigation. Should he counsel his client to cooperate totally with the government, to volunteer, speculate and hypothesize in a manner needed by the prosecution; or should he tell the witness to only answer on the basis of real observation and knowledge, not to speculate and not to assist the government in formulating the avenues of inquiry which it should be pursuing? This Court, in this case, will significantly affect those decisions.

We submit that a lawyer's knowledge of the probable publication of his client's testimony will act to stifle the appropriate subjects of a grand jury investigation and interfere with the government's ability to prosecute. If, on the other hand, a lawyer believes that his client's testimony will be revealed under only the most urgent

of circumstances, the client will testify freely and society's interest in the prosecution of the guilty will be furthered.

The government and Petrol Stops ignore these concerns and contend that no need for continued grand jury secrecy exists. (PSN Br. 10, 14, 15, and 32; U.S. Br. 5, 7, 14 and 16.)[1] Respondents then submit, inconsistently, that the protective order entered by the district court safeguarded whatever needs for grand jury secrecy did remain after the conclusion of the criminal proceeding. (PSN Br. 12, 15, 24-28, and 31-34; U.S. Br. 17.) Unfortunately, the protective order entered entirely failed to protect those needs. The ability of any protective order to protect adequately the need for grand jury secrecy was lost when the lower court ordered the disclosure of grand jury testimony far in excess of that for which any particularized need could ever be demonstrated.

In this case (and other antitrust cases like it) a procedure should be observed that permits the civil court to determine whether one of its litigants has a particularized need for grand jury testimony. Neither the interests of civil litigants nor the needs of the criminal justice system are served where, as here, a court wholly unfamiliar with two different complex antitrust suits determines whether disclosure of grand jury testimony for use in those proceedings is required. Douglas and Phillips invited the California court, even if it wished to retain jurisdiction, to defer the determina-

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[1]References to the Brief of Respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco are noted as "PSN Br.". References to the Brief of Respondent United States are noted as "U.S. Br.". "A." refers to the Appendix. Petitioners Opening Brief is cited as "Pet. Op. Br.".

tion of particularized need to the trial court. The California court declined to do so.

The California court could also have prudently declined to exercise its jurisdiction over the matter entirely. Douglas and Phillips contend that Rule 6(e) of the FRCrP conferred upon both the California court and the Arizona court the power to rule on the matter and, therefore, the California court should have declined to do so, leaving the matter to the better informed tribunal. Neither the government nor Petrol Stops offers legitimate or persuasive reasons why those procedures were not eminently more desirable than the one employed by the California court.

I

Compelling Reasons for Continued Grand Jury Secrecy Survive an Antitrust Criminal Proceeding

The realities of an antitrust grand jury investigation —the community and business reputation of the individuals that are investigated or give testimony, the multitude of business practices that are normally scrutinized and the uncorroborated rumors, tips and suspicions which are the substance of much of the testimony —combine to require that grand jury testimony remain secret to the highest extent possible even after the conclusion of the criminal proceeding.

The district court below ordered disclosed to Petrol Stops the entire text of each and every grand jury transcript of Douglas and Phillips employees and ex-employees. (A. 48-49.) Douglas and Phillips never

represented, as respondents incorrectly contend, that the transcript of all the grand jury proceedings was ordered disclosed by the California court. (PSN Br. 27; U.S. Br. 14.) Rather, Douglas and Phillips have explicitly stated the extent of the disclosure sought by Petrol Stops and ordered by the California court.[2] Nevertheless, Petrol Stops seeks to have this Court believe that all the reasons which Douglas and Phillips offer as requiring continued grand jury secrecy are premised on this faulty assumption. None of the reasons for the continued need for grand jury secrecy offered by Douglas and Phillips are premised on anything more than what the California court *did* order disclosed—the entire text of every Douglas and Phillips employee and ex-employee's grand jury transcript.

The transcripts ordered produced to Petrol Stops will necessarily contain references to companies and individuals other than Douglas and Phillips and their employees. Antitrust investigations are unlike most

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[2]In the Statement of the Case in Petitioners' Opening Brief, Douglas and Phillips state: "Petrol Stops filed and served in the Arizona actions a request for production of all of the grand jury documents and transcripts in the possession of Douglas and Phillips." (Pet. Op. Br. 5.) A footnote to that quoted sentence reads: "[8]Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury." (Pet. Op. Br. 5.) Immediately thereafter, petitioners relate that Petrol Stops filed a petition for production of grand jury material in the United States District Court, Central District of California which ". . . sought the disclosure of the same documents and transcripts which had been the subject of Petrol Stops' Rule 34 request in the Arizona actions. . . ." (Pet. Op. Br. 5.) "The district judge entered an order granting Petrol Stops' production request with certain limitations on use of the materials." (Pet. Op. Br. 7.)

others for they normally examine a multitude of firms, individuals and business transactions; and any indictment that does issue will likely embrace but a small portion of the total business activities examined by the grand jury.[3] Where, as in this case, a private civil litigant receives a copy of *everything* that was said while the witness was before the grand jury, the possibility of personal and financial harm to that witness because of others learning what he said about them is considerable. (Pet. Op. Br. 11-15.)

If the broad disclosure to Petrol Stops in this case is upheld, the flow of information to subsequent antitrust grand juries will be impaired. An affirmation of this broad disclosure will signal to all future antitrust grand jury witnesses that everything they say before the grand jury can be expected to be accessible and used by a private civil litigant. This will be true even though (as in this case[4]) the private civil litigant had no

[3]The government, in arguing that the California court released only that grand jury material responsive and relevant to Petrol Stops' purported need, makes the surprising statement: "Because of the restricted allegations of the indictment, it must be supposed that all the testimony of petitioners' employees before the grand jury was relevant to the issue now before the civil court." (U.S. Br. 14.) To assume, as the government apparently does, that the scope of a grand jury investigation is never any broader than an indictment that issues is ludicrous. By that logic one would be forced to assume that, where a grand jury investigates certain activities and no indictment issues, the grand jury investigation never really occurred.

[4]Neither plaintiff in the Arizona cases ever purchased gasoline from either petitioner. *See* Appellants' Opening Brief before the Ninth Circuit at pages 8 and 9. While Petrol Stops' primary supplier of gasoline, Armour Oil Company ("Armour"), was in turn supplied by Douglas and Gulf Oil Company (PSN Br. 28.), Armour was not named in either the Indictment or the Bill of Particulars.

direct dealings or relationship with the entities indicted by the grand jury or to the witnesses who testified before the grand jury.

Lawyers have an obligation to fully inform their clients of the consequences of any and all acts or statements made by the client. Thus, grand jury witnesses will be fully informed of the possible and extensive use of their testimony prior to testifying. Also, lawyers can be expected, in their clients' interest, to more aggressively counsel the grand jury witnesses that, while they are obligated to tell the truth before the grand jury, they should decline from offering any opinions, rumors or suspicions and that the only facts which should be supplied by the witness are those directly elicited by specific questions. To assume, as the government does (U.S. Br. 17.), that a prospective grand jury witness, who knows of the extensive possible use and publication of his entire testimony, will testify as fully and completely as he would otherwise is to ignore human nature. The ability of a grand jury to ferret out antitrust violations should not be so compromised, particularly where a more restrictive and selective disclosure can fully satisfy any demonstrated particularized needs of civil litigants.

The possible harm which could arise from the disclosure of the entire text of a witness' transcript to a private civil litigant is not confined to that witness or to the grand jury system. Within that witness' transcript may be disclosed the names of innocent individuals and all the acts they may have been suspected of doing by that witness, by the prosecutor or by a grand juror, as revealed in the questions to that witness. The need to protect the innocent accused from disclosure of the fact that he was under investigation

is a concern that neither Petrol Stops nor the government seriously addresses. Petrol Stops chooses instead to assert erroneously that Douglas and Phillips for the first time argue this issue before this Court.[5] (PSN Br. 10, 11 and 27.) An entire *section* of Douglas and Phillips' brief before the Ninth Circuit was devoted to this issue.[6] Petrol Stops then proffers an argument for which there is neither factual, precedential nor logical support. Petrol Stops suggests that Rule 16 of the FRCrP *insures* that no interest to an innocent party is endangered because that Rule provides that only those portions of employee witness transcripts which are "relevant" to the offense charged are released. (PSN Br. 11, 14, 17 and 28.) Petrol Stops cannot believe, as it entreats this Court to do, that every reference to every investigated individual or corporation who was not indicted that appears in a witness' transcript was excised from that transcript prior to its release to that witness. In fact, the prevailing practice among all courts is to release to any indicted defendant the entire text of his testimony before the grand jury for use during

[5]"The defendants in their brief for the first time argue the disclosure ordered endangered another interest sheltered by grand jury secrecy—the need to protect an innocent accused from exposure of a prior criminal investigation. This argument was not made to the lower courts." (PSN Br. 10.)

[6]*See* Section I.B.2 of the Reply Brief of Appellants before the United States Court of Appeals for the Ninth Circuit, at pages 15 and 16, which is entitled:

Grand Jury Secrecy Is Also Necessary in This Case, Absent a Showing of Particularized Need, to Protect the Innocent Accused Who is Exonerated from Disclosure of the Fact That He Has Been Under Investigation and from the Expense of Standing Trial Where There Was Probably No Guilt.

his criminal defense. *United States v. Longarzo,* 43 F.R.D. 395, 396 (S.D.N.Y. 1967); *United States v. Gleason,* 259 F.Supp. 282, 285 (S.D.N.Y. 1966); and *United States v. United Concrete Pipe Corporation,* 41 F.R.D. 538, 539 (N.D. Tex. 1966). This prevailing practice was followed by the California court in this case.

II

The Possibility of Harm to Grand Jury Witnesses, Innocent Parties and the Grand Jury System Occasioned by the Overly Broad Disclosure Ordered by the Courts Below Cannot and Will Not Be Prevented by a Protective Order

Douglas and Phillips submit that Petrol Stops never demonstrated a particularized need for disclosure of any portion of the transcripts of Douglas and Phillips witnesses, much less for the entire texts of those transcripts. (Pet. Op. Br. 21-26.) Douglas and Phillips in answers to a single interrogatory question stated that they were unaware of any conversation or communication with major oil company competitors regarding the wholesale price of gasoline sold to unbranded marketers. These were claimed by respondents to be contradicted by the *nolo contendere* pleas by Douglas and Phillips to an indictment in which they were co-defendants with entirely different non-major oil companies. Such was Petrol Stops' "need" to impeach these answers.

It is difficult to conceive any need to impeach an interrogatory answer.[7] Even so, no admission of guilt

[7]The interrogatory answers are not in evidence in the civil cases and can be made so only if placed there by respondents.

(This footnote is continued on next page)

from a *nolo contendere* plea extends beyond that needed for disposition of the proceedings in which it is entered. *North Carolina v. Alford,* 400 U.S. 25, 35 n.8 (1970).[8] But if the contrary were true, it is sheer speculation that the transcripts would contain any information contradicting the interrogatory answer. No justification was

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Presumably respondents would not deliberately place themselves in the position of having to impeach evidence offered by themselves. Even should they contemplate this, how can the answer be impeached except by proof of Petrol Stops' claim of conspiracy? Thus, Petrol Stops' need is not a *particularized* need but the common need of all plaintiffs—the need to prove their causes of action.

[8]In criminal antitrust actions brought by the government, a defendant's plea of *nolo contendere* is recognized as an aid to antitrust enforcement by encouraging defendants to capitulate with the result of saving time and expense to the Antitrust Division of the government. *See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.,* 323 F.2d 412, 415 (7th Cir. 1963); *cert. denied,* 376 U.S. 939 (1964). A defendant's reasons for pleading *nolo* may be based upon considerations wholly separate from any alleged guilt on its part, *e.g. United States v. Prince,* 533 F.2d 205, 207 (5th Cir. 1976). Further, the trial court may, on the government's objection, refuse to accept the plea where the government's proof is more than adequate and the offense is of a more serious nature, thereby serving the objective of aiding private treble damage actions by private litigants where appropriate. *Commonwealth Edison Co., supra,* 323 F.2d at 416-417.

The incentive for a defendant's *nolo* plea is the rule that his plea is only an admission for purposes of the criminal antitrust case wherein it is entered and no other. *See Alford, supra,* 400 U.S. at 35; Section 5(a) of the Clayton Antitrust Act, 15 U.S.C. §16(a). Respondents herein have failed to consider the concomitant detrimental effects of their contention that a *nolo contendere* plea in an antitrust case may subsequently be used by an unrelated civil litigant as *prima facie* evidence of impeachment value in obtaining the defendant's grand jury transcripts. (PSN Br. 33-34; U.S. Br. 13.) Their position, if adopted by this Court, would have an extreme chilling effect on the use of *nolo* pleas as it would signal to antitrust defendants that their pleas may be used for impeachment in subsequent civil actions and as an easy means of gaining access to otherwise secret grand jury materials. Such a result is clearly contrary to and would undermine the congressional purpose behind Section 5(a) of the Clayton Act. *Cf.,* Note, Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions, 85 Yale L. J. 541, 562-563 (1976).

shown for the disclosure of any part of any transcript much less the whole of all Douglas and Phillips' transcripts.

The California court's utter failure to require a showing of particularized need is aptly illustrated by its order which permits the use of transcripts for purposes different than the need that Petrol Stops offered to justify disclosure. Assuming Petrol Stops' need to impeach the interrogatory answers and that the transcripts were actually sought for that purpose, the order entered permitted use of the transcript of each person for wholly different purposes: "to be used . . . solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial." (A. 48-49.) No showing had been made that any witness needed his recollection refreshed. There was *no* testimony to be impeached because no witness had testified. There was no certainty that any particular witness would be called. Thus, there was no justification for the disclosure of the entire transcript or any part thereof.

The disclosure of all the testimony contained within a witness' transcript involving unrelated business practices and the suspected conduct of parties who were never indicted cannot satisfy any legitimate need much less the "particularized need" offered by Petrol Stops. Instead that overly-broad disclosure succeeds in endangering the legitimate needs of grand jury witnesses, third parties mentioned by grand jury witnesses, and the grand jury system which the "particularized need" requirement was itself conceived to protect. Once disclosed, no protective order can adequately protect the individuals who are endangered by an unnecessary broad disclosure ordered by a court.

The risk of retaliation against a grand jury witness from firms and individuals other than a witness' corporate employer remains despite any protective order. A civil plaintiff pursuing treble damages in an antitrust case has every incentive to interview any and all individuals who are mentioned in a grand jury transcript. In so doing, the third parties interviewed and possibly deposed by counsel will undoubtedly learn all that the grand jury witness said about them. This unfortunate result may occur even though the substance of the grand jury witness' testimony may have had nothing at all to do with the subject matter of that lawsuit! Petrol Stops has itself revealed that it does not intend to be bound by the issues of its lawsuit when it embarks upon general discovery under the broad aegis of this "protective order".

> Access to grand jury materials for the sole purpose of attacking or testing credibility raises no issues which compel reference of the plaintiffs' petition to the district court in which the antitrust actions are pending. (PSN Br. 18.)

The language of the present protective order, coupled with the fact that no depositions had been taken prior to disclosure of the transcripts, does not practically limit Petrol Stops' use of the transcripts. The order permitted use of a witness' transcript "for the purpose of impeaching that witness or refreshing the recollection of a witness." (A. 49.) Since it is not possible to impeach statements not yet said, a transcript could be used as a detailed deposition outline, eliciting all statements which could then be impeached by reference to the transcribed testimony. Such a use would arguably still be for "impeachment purposes", but it is hardly the narrow use which Petrol Stops and the government

suggest the protective order insures. The identical anticipated use was held by this Court not to constitute a "particularized need" in *United States v. Procter & Gamble Company*, 356 U.S. 677, 682-683 (1958).

Notwithstanding Petrol Stops' protestations regarding the rigors of the protective order and the Code of Professional Responsibility (PSN Br. 27.), it is too much to expect that a fact, once learned by an advocate, will be forgotten for all purposes except those for which he is "allowed" to use it. If any information becomes available that a party exonerated by the grand jury *may* have been guilty of wrongdoing for which a private civil litigant arguably has a right of recovery, it is reasonable to expect that the "innocent party" will be investigated by the private civil litigant and may be made a party to the civil litigation even though no information other than that presented to the grand jury is developed by that private litigant. To expect otherwise of this or any other civil antitrust litigant is simply not realistic. But to make this "innocent accused" face suit in a civil proceeding only because a grand jury witness related some uncorroborated suspicion or tip is patently unfair. If the interests and needs of innocent parties, grand jury witnesses and the grand jury system are to be adequately protected, selective disclosure and not broad disclosure with the promise of selective use is required.

III

Selective Disclosure Satisfies the Needs of Civil Litigants and Adequately Protects the Continuing Need for Grand Jury Secrecy

Petrol Stops argues that the disclosure of entire witness transcripts coupled with a protective order is the only practical alternative. (PSN Br. 32.) It is

not. An approach which unnecessarily discloses grand jury testimony and exposes individuals and the grand jury system to injury is hardly a practical or desirable solution to the problem. Adequate protection of these interests within the context of antitrust litigation requires that only those *portions* of a witness' transcript that satisfy a civil litigant's actual and compelling need should be disclosed. References to innocent individuals, information readily accessible through civil discovery means, matters unrelated to plaintiff's lawsuit and/or the indictment should not be disclosed beyond the criminal proceeding. The only practical means of assuring such a result is an *in camera* inspection.

Petrol Stops assumes that this Court will be unwilling to protect the continued needs for grand jury secrecy as they exist in this and other antitrust cases if disclosure less broad than the production of an entire witness transcript is required to do so. Petrol Stops cites *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959), as evidencing this Court's reluctance to require a showing of contradiction before access is granted (PSN Br. 33.), and cites *Dennis v. United States,* 384 U.S. 855 (1966), as precluding an *in camera* inspection as a satisfactory alternative. (PSN Br. 53.)

The *Dennis* case cannot fairly be read to mean, as Petrol Stops suggests, that an *in camera* inspection is never appropriate when grand jury materials are sought. In that very case, this Court made reference to the "long-established policy" of grand jury secrecy and lifting its veil "discreetly and limitedly" in those instances where appropriate, *Dennis, supra,* 384 U.S. at 869-870. A reference to the unanimous view of this Court in

Pittsburgh Plate Glass indicated that, upon a showing of particularized need, defense counsel "might have access to *relevant portions* of the grand jury testimony of a trial witness." *Dennis, supra,* 384 U.S. at 870 [emphasis added]. Moreover, the rejection of *in camera* inspection by this Court in *Dennis* was founded on the concern that a federal judge should not, in the middle of a criminal trial determine what portion of an actual, accusatory witness' transcript may be of utility in a cross-examination by the counsel charged with the defense of the accused.[9] It is quite a different matter, in the course of a civil proceeding (*not* in the middle of a trial) for the trial judge (or magistrate) to determine whether a portion of a transcript falls within an articulated "particularized need". This Court has never affirmed, ordered, condoned or otherwise intimated that *entire* grand jury witness transcripts are to be disclosed to *any* parties, let alone civil plaintiffs. Yet Petrol Stops offers precisely that result as "the only practical alternative" when grand jury testimony is sought.

An *in camera* inspection of antitrust grand jury testimony is required if both the special needs for continued grand jury secrecy that accompany an antitrust grand jury and the legitimate needs of litigants are to be satisfied. If the judge does not have time, this task can easily be accomplished with the use of

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[9]Although *Dennis* shows concern for substituting the trial court's judgment for that of defense counsel in determining what specific language in the grand jury transcript would be helpful in cross examining the witness, a careful reading of the opinion shows this Court's continuing concern that the court examine the transcript sufficiently to delete those portions not relevant to the subject matter of the witness' testimony in the criminal trial.

magistrates.[10] The use of magistrates to inspect, *in camera*, grand jury testimony will permit the proper disclosure of grand jury materials without excessive demands upon district court judges.

IV

The California Court Should Have Either Declined to Rule on Petrol Stops' Petition and Instructed Petrol Stops to Seek a Ruling From the Trial Court or Deferred the Question of Need to the Trial Court

The trial court whose task it is to supervise these complex antitrust actions was the court best equipped to determine whether plaintiffs had a particularized need for the grand jury testimony sought. In this case, a judge wholly unfamiliar with the grand jury proceeding or with the complex civil antitrust cases, their discovery status and pretrial schedules should at the very least have deferred the issue of need to the Arizona court. A better approach would have been for the California court to decline entirely to rule on the petition before it and instruct Petrol Stops to seek a ruling from the Arizona court on the issue. Either available course would have been preferable to the procedure followed by the California court.

That the Arizona court was the most informed tribunal to decide the issue of need is hardly debatable. Petrol Stops insists it is no problem for a court to determine relevancy of grand jury material to a suit pending in another court because all that is required is a mere

[10]Since *Dennis*, 384 U.S. 855 (1966), the Federal Magistrate Act, 28 U.S.C. § 631 *et seq.*, has been enacted in 1968. That Act was passed to permit district courts to increase their overall efficiency, *Mathews v. Weber*, 423 U.S. 261, 266-270 (1976), and to allow magistrates to more actively assist judges in their judicial decision-making functions. ***O'Shea v. United States***, 491 F.2d 774, 777 (1st Cir. 1974).

look at the claims and defenses in the action. Such a view ignores the dispositive effects of pretrial and interim orders of the trial judge that are common but important in complex antitrust actions. Why, for example, should grand jury materials be turned over if a plaintiff's claim may be vulnerable to attack on the basis of standing or lack of injury under the doctrine articulated by this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)?

Petrol Stops does not choose to address substantively the contention that the determination of relevancy in complex antitrust actions is a formidable task often requiring information beyond the four corners of the complaint. (Pet. Op. Br. 28-31.) Instead, we are told, it is not a formidable task and one to which district courts are accustomed. (PSN Br. 18, 37 and 38.)[11] Only where courts consistently err on the side of liberal discovery is a relevancy determination in a complex antitrust action an easy task. That tendency of courts in the past has led to the popular dissatisfaction with the current scope of discovery and, correspondingly, to the suggested revisions to Rule 26(b)(1) of the FRCP. (Pet. Op. Br. 31.) The trial court was better equipped to rule on relevancy. It was also the better equipped to rule on issues other than rele-

[11]Petrol Stops, attempting to argue by analogy, notes that district courts, other than the district in which an action is pending, frequently determine issues of relevancy for the purpose of ruling on deposition subpoenas under Rule 45(d)(1), Federal Rules of Civil Procedure ("FRCP"). (PSN Br. 18, 37 and 38.) The procedural rule cited by Petrol Stops reflects the need to have *some* court decide a discovery issue where a third party witness is not within the jurisdiction of the informed trial court. It hardly supports the proposition that the two courts are equally well-equipped and informed to rule on the relevancy issue as to the claims of the parties that are subject to the trial court's jurisdiction.

vancy which are required to show particularized need—whether the information is accessible through other discovery means and whether a particularized rather than simply a general need for the testimony exists. The California court ignored the clear advantage of the trial court with respect to these issues.

The California judge's offer to phone the Arizona judges and inquire whether they had any objection to the California court's ruling did not, as Petrol Stops suggests, discharge any obligation of the California court to defer the issue of relevance and need to the more informed trial court. (PSN Br. 38-40.) The judge did not offer to place the particularized need issue before the trial court. He did not offer to present to the trial court the competing arguments of counsel and the benefits of a hearing. The judge instead simply offered to "telephone Judge Walsh and Judge Frey to see if they have any objection" to a brother judge's ruling. (A. 56.) That offer falls far short of providing for the trial court's informed participation in the matter.

Petitioners do not contend either that the grand jury court lacks power to order disclosure or that the government should be excluded from participation in the court's determination. The government will not be excluded. The government is the party from whom the defendant in a criminal proceeding must originally seek the transcript. If the government desires to enforce the general policy of grand jury secrecy or if it has a particularized motivation (such as the protection of an informer), it may request that the order releasing the transcript to the defendant contain appropriate restrictions on its use and that the transcript be returned at the close of the criminal case.

The grand jury court may order the release of the transcript to the defendant without restriction. In such a case, any subsequent court having jurisdiction over the defendant may order him to produce the transcript upon an appropriate showing. The government would not need to be a party to that latter proceeding since it had been a party in the initial proceeding which ordered the release of the transcript without restriction.

In the more common situation, a court order releasing a transcript to a defendant contains restrictions on the use of the transcript and requires its return at the close of the criminal proceeding. Such restrictions may require a party seeking the transcript from the defendant to petition the court which issued the order to lift the restrictions. If the restrictions are to be lifted by the grand jury court, the Government would automatically be a party to that proceeding, and the trial court can then address the issue of particularized need upon receipt of an appropriate application.

V

Phillips and Douglas Had Standing to Challenge an Order Granting Access to Transcripts of Their Witnesses' Grand Jury Testimony

Petrol Stops raises an issue for which no cross-petition for certiorari was filed: whether Douglas and Phillips had standing to challenge an order granting access to grand jury materials under Rule 6(e) of the FRCrP. (PSN Br. 40-42.) Petrol Stops is precluded by the Ninth Circuit's final ruling and their failure to petition for certiorari on this issue from now seeking review of it. Rule 40(1)(d)(2) of the Revised Rules of the United States Supreme Court; *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967);

J. I. Case Co. v. Borak, 377 U.S. 426, 428 (1964). Moreover, the Ninth Circuit correctly held that Douglas and Phillips did have standing to challenge the district court's order. (A. 2-4.) *Cf., Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152-154 (1970).

Conclusion

The end of the criminal proceedings does not end the need for grand jury secrecy. If actual harm to individuals and the grand jury system is to be avoided, and litigants afforded access to specific testimony when their legitimate needs require it, the particularized need standard that regulates the disclosure of grand jury materials must be observed and procedures must be employed to insure that that standard is observed. Otherwise, the ability of future grand juries to ferret out antitrust violations will be severely and unnecessarily compromised.

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